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Police Efficiency and the Fourth Amendment

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Police Efficiency and the Fourth Amendment[†]

L. SONG RICHARDSON*

ABSTRACT

Much of our Fourth Amendment jurisprudence is premised upon a profound misunderstanding of the nature of suspicion. When determining whether law enforcement officers had the reasonable suspicion necessary to justify a “stop and frisk,” courts currently assume that, in any given case, the presence or absence of reasonable suspicion can objectively be determined simply by examining the factual circumstances that the officers confronted. This Article rejects that proposition. Powerful new research in the behavioral sciences indicates that implicit, nonconscious biases affect the perceptions and judgments that are integral to our understanding of core Fourth Amendment principles. Studies reveal, for example, that many people regard ambiguous actions performed by non-Whites as suspicious, but regard Whites’ performance of those same actions as innocuous. Empirical evidence also demonstrates that officers vary in their ability to overcome implicit biases. Utilizing the behavioral realism framework, this Article considers whether courts should supplement their objective, fact-centered approach to stop-and-frisk cases with one that is more officer-centric. Rather than treat reasonable suspicion as something that either is or is not objectively provoked by a given case’s facts, this Article explores whether courts should place a heavy emphasis on each officer’s “hit rate”—the rate at which an officer has successfully detected criminal activity when conducting stop and frisks in the past. This move, combined with a more robust articulation requirement, may better protect Fourth Amendment norms.

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INTRODUCTION

This Article argues that provocative new research in the mind and behavioral sciences can transform our understanding of core Fourth Amendment principles.¹ Recent research in the field of implicit social cognition—a combination of social psychology, cognitive psychology, and cognitive neuroscience²—demonstrates that individuals have implicit (nonconscious) biases that can perniciously affect the perceptions, judgments, and behaviors that are integral to core Fourth Amendment principles. Drawing from recent implicit social cognition research and prior work,³ this Article attempts to solve a conceptual puzzle that continues to stymie courts and Fourth Amendment scholars. How can the “reasonable suspicion” standard promote efficient policing—policing that protects liberty against arbitrary intrusion while simultaneously promoting effective law enforcement?

The reasonable suspicion standard attempts to strike a delicate balance between individual privacy rights and law enforcement needs. This standard serves law enforcement interests by permitting officers to act on their suspicions of criminal

1. This Article utilizes the behavioral realist approach, which argues that judges should not base their theories of human behavior on a purely conceptual, a priori process but rather, on the best empirical scientific evidence that exists. For a summary of this approach, see Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465 (2010); *Symposium on Behavioral Realism*, 94 CALIF. L. REV. 945 (2006). For recent scholarship utilizing this approach, see Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893 (2009); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945 (2006); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action,”* 94 CALIF. L. REV. 1063, 1064 (2006) [hereinafter Kang & Banaji, *Fair Measures*]; Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471 (2008); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 354 (2007); Justin D. Levinson, Huajian Cai & Danielle Young, *Guilt by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187 (2010); Rigel C. Oliveri, *Between a Rock and a Hard Place: Landlords, Latinos, Anti-Illegal Immigrant Ordinances, and Housing Discrimination*, 62 VAND. L. REV. 55 (2009); see also Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153 (arguing that the Supreme Court’s consent jurisprudence should incorporate findings from the psychology of compliance).

2. Jerry Kang & Kristin Lane, *A Future History of Implicit Social Cognition and the Law* (UCLA School of Law, Research Paper No. 09-26, 2009) [hereinafter Kang & Lane, *Future History*], available at <http://ssrn.com/abstract=1458678>.

3. L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035 (2011).

activity even in the absence of probable cause. However, in order to prevent arbitrary police actions, courts impose an articulation requirement that obliges officers to justify the intrusion by stating the facts—not mere hunches—that led them to feel suspicious of the individual’s ambiguous behaviors. Courts then review these facts to determine whether they give rise to a reasonable inference of criminality.

Ultimately, the standard fails to protect against unjustified encroachments upon individual liberty because it treats suspicion as an objective concept. Courts assume that it is possible to objectively determine whether people are acting suspiciously. They also assume that only people who are behaving suspiciously will be accosted by the police and restrained in their freedom to walk away.⁴ This assumption is crucial to the efficacy of the safeguards against arbitrary policing offered by the reasonable suspicion standard.

This Article makes the case, however, that the assumptions driving Fourth Amendment stop-and-frisk jurisprudence are flawed; they are based upon a critical misunderstanding of the nature of suspicion. Implicit social cognition research demonstrates that implicit biases can affect whether police interpret an individual’s ambiguous behaviors as suspicious. For instance, studies repeatedly reveal that people evaluate ambiguous actions performed by non-Whites as suspicious and criminal while identical actions performed by Whites go unnoticed.⁵ The current operation of the articulation requirement does not ameliorate the problem because an officer will likely be unaware that nonconscious biases affected his or her interpretation of ambiguous behavior. Thus, an officer who acts on his suspicions can easily point to the specific facts that he believes made him feel suspicious without even realizing that implicit biases affected how he interpreted the behavior.

“Arrest efficiency,”⁶ or hit-rate data, provides evidence of these biases. Arrest efficiency refers to the rates at which the police find evidence of criminal activity when conducting a stop and frisk. When available, these data consistently demonstrate that the hit rates are lower for non-Whites than for Whites, or that the rates are at least equal. For instance, in Minnesota, a 2003 report conveyed that the hit rates for finding contraband were 11.17% for Blacks and 23.53% for Whites.⁷ In 2010, in New York City, the hit rates for finding contraband were 1.89% for Blacks and 2.42% for Whites.⁸ Although the hit rates for Whites were higher than for Blacks, Blacks were stopped and frisked far more often than Whites.⁹

4. This paraphrases language from *Terry v. Ohio*, 392 U.S. 1, 16 (1968), the seminal Supreme Court decision that created the reasonable suspicion standard.

5. See *infra* notes 23–34 and accompanying text.

6. This phrase is borrowed from Andrew Gelman, Jeffrey Fagan & Alex Kiss, *An Analysis of the New York City Police Department’s “Stop-and-Frisk” Policy in the Context of Claims of Racial Bias*, 102 J. AM. STAT. ASS’N 813, 821 (2007) [hereinafter Gelman et al., *NYPD Analysis*].

7. MINNESOTA STATEWIDE RACIAL PROFILING REPORT: ALL PARTICIPATING JURISDICTIONS 22 (2003), available at <http://www1.umn.edu/irp/racialprof/aggregate%20report%2092303.pdf>.

8. CTR. FOR CONSTITUTIONAL RIGHTS, NYPD STOP-AND-FRISK STATISTICS 2009 AND 2010, available at http://ccrjustice.org/files/CCR_Stop_and_Frisk_Fact_Sheet.pdf.

9. In 2009, Blacks comprised 53% of those stopped and frisked while Whites were only

Implicit social cognition research demonstrates that while implicit biases are ubiquitous, their magnitude and effects on judgments vary both across individuals and across situations. Hence, officers are not equally proficient at determining whether ambiguous behaviors actually denote criminality. Accounting for these differences in officers' abilities can help ameliorate the current shortcomings of the reasonable suspicion standard.

In order to promote efficient policing and safeguard individuals against the effects of implicit biases, this Article contemplates a judicial refocus of the reasonable suspicion standard, one that does not solely assess whether an individual is acting suspiciously (the current fact-centered approach). Rather, this Article evaluates whether courts should also weigh an officer's skill at judging the criminality of ambiguous behavior by examining "police efficiency" data—the rate at which the individual officer finds evidence of criminality when conducting a stop and frisk (the officer-centric approach). Under this new approach, police efficiency would play a central role in a court's determination of the reasonableness of a Fourth Amendment seizure. Additionally, this Article explores whether broadening the scope of the articulation requirement by requiring officers not only to state the factual basis for the stop, but also the relationship between their training and experience and the facts that led to the stop will better effectuate Fourth Amendment norms.

My argument unfolds in three parts. Part I introduces the science of implicit social cognition and examines its relevance to core Fourth Amendment principles. Part II scrutinizes the reasonable suspicion standard and exposes its weaknesses. Part III draws from implicit social cognition research to reconceptualize the reasonable suspicion standard. It ends by considering some of the benefits and shortcomings of this new approach.

I. THE SCIENCE

The science of implicit social cognition studies nonconscious mental processes.¹⁰ These are processes that occur outside of conscious awareness and that operate largely without conscious control.¹¹ Decades of research demonstrate that people's feelings, perceptions, decision making, and behaviors are influenced by

stopped and frisked 9% of the time. *Id.* When researchers studying the stop and frisk practices of the NYPD controlled for the racial composition and crime rates of neighborhoods as well as arrest rates, they found that stops of Whites were more likely to lead to an arrest than stops of either Blacks or Hispanics. Gelman et al., *NYPD Analysis*, *supra* note 6, at 820. They also found that "for the most frequent categories of stops—those associated with violent crimes and weapons offenses—blacks and Hispanics were much more likely to be stopped than whites" *Id.*

10. See ZIVA KUNDA, SOCIAL COGNITION: MAKING SENSE OF PEOPLE 1–3 (1999) (describing evolution of social cognition); Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RES. 143, 144 (2004) (same).

11. See Kang & Banaji, *Fair Measures*, *supra* note 1, at 1064

these automatic processes.¹² The idea that individuals have conscious control over all of their actions and judgments has been described as naïve.¹³

Implicit social cognition research demonstrates that people have nonconscious reactions to others that can negatively influence their behaviors.¹⁴ These implicit biases¹⁵ begin when people categorize others both consciously and nonconsciously by race, gender, or a host of other socially relevant categories. Categorization triggers implicit stereotypes and attitudes.¹⁶ Stereotypes refer to “the general inclination to place a person in categories according to some easily and quickly identifiable characteristic such as age, sex, ethnic membership, nationality, or occupation, and then to attribute to him qualities believed to be typical of members of that category.”¹⁷ An attitude is “an evaluative disposition—that is, the tendency to like or dislike, or to act favorably or unfavorably toward, someone or something.”¹⁸ Researchers believe that implicit stereotypes and attitudes originate from “the deep influence of the immediate environment and the broader culture on internalized preferences and beliefs.”¹⁹

What is surprising about implicit stereotypes and attitudes is that they can and often do conflict with an individual’s genuine and consciously held thoughts and feelings.²⁰ For instance, implicit social cognition research demonstrates that most individuals of all races, including Blacks, have implicit biases against Blacks that have behavioral consequences. This is not surprising since in our culture, Blacks, particularly young black men, are stereotyped as violent, criminal, and dangerous.²¹

12. KUNDA, *supra* note 10, at 266.

13. Greenwald & Krieger, *supra* note 1, at 946.

14. KUNDA, *supra* note 10, at 266; *see also* Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 6 (1989) (“Automatic processes involve the unintentional or spontaneous activation of some *well-learned set of associations or responses* that have been developed through repeated activation in memory. They do not require conscious effort and appear to be initiated by the presence of stimulus cues in the environment.” (emphasis added)).

15. The phrase “implicit bias” refers to “discriminatory biases [favorable or unfavorable] based on implicit attitudes or implicit stereotypes.” Greenwald & Krieger, *supra* note 1, at 951.

16. KUNDA, *supra* note 10, at 266.

17. Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks*, 34 J. PERSONALITY & SOC. PSYCHOL. 590, 591 (1976) (quoting Henri Tajfel, *Social and Cultural Factors in Perception*, in HANDBOOK OF SOCIAL PSYCHOLOGY 423 (Gardner Lindzey & Elliot Aronson eds., 1969)).

18. Greenwald & Krieger, *supra* note 1, at 948.

19. Brian A. Nosek, Mahzarin R. Banaji & Anthony G. Greenwald, *Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Web Site*, 6 GROUP DYNAMICS 101, 112 (2002).

20. Kang & Lane, *Future History*, *supra* note 2, at 8.

21. Jennifer L. Eberhardt, Phillip Atiba Goff, Valerie J. Purdie & Paul G. Davies, *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 876 (2004) (“The stereotype of Black Americans as violent and criminal has been documented by social psychologists for almost 60 years.”); Sophie Trawalter, Andrew R. Todd, Abigail A. Baird & Jennifer A. Richeson, *Attending to Threat: Race-Based Patterns of Selective Attention*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 1322, 1322 (2008) (“There is overwhelming

Problematically, implicit biases can affect behaviors in ways that individuals are unaware of and often unable to control. Some of these behavioral effects will be discussed next.²² The discussion will center around race and, in particular, the effects of implicit biases on the treatment of Blacks for two reasons. First, race continues to play a significant role in police-citizen interactions. Thus, any conversation about stop-and-frisk practices would be incomplete without a discussion of race. Second, understanding the influence of implicit social cognitions on police behavior complicates the discussion of race and policing. The typical arguments that the disproportionate policing of Blacks can be explained either by conscious racial bias on the part of the police or by the assumption that Blacks engage in more ambiguously criminal behavior does not withstand scrutiny.

One behavioral effect of implicit bias is that it influences how individuals interpret the ambiguous behaviors of others.²³ An early study documenting the effects of negative racial stereotypes on the interpretation of behavior involved white subjects evaluating an ambiguous physical contact between two men.²⁴ The researchers had the subjects watch a video of two men having a heated discussion. The subjects were unaware that the men depicted in the video were actually actors following a script. At one point in the video, one man shoves the other, and the subjects had the option of rating this behavior as horsing around, dramatic, aggressive, or violent.²⁵ The researchers hypothesized that the race of the men in the video would affect how the subjects interpreted the ambiguous shove.

They were right. When both subjects in the video were white, only 13% labeled the contact as aggressive.²⁶ However, when both were black, that number rose to 69%.²⁷ Similar differences in interpretation occurred in interracial scenarios. When the aggressor (pusher) was white and the victim was black, only 17% of the subjects interpreted the shove as violent.²⁸ Conversely, when the victim was white and the aggressor was black, the percentage of subjects who viewed the shove as

evidence that young Black men are stereotyped as violent, criminal, and dangerous . . . both implicitly as well as explicitly.” (citation omitted)); see also Patricia G. Devine & Andrew J. Elliot, *Are Racial Stereotypes Really Fading? The Princeton Trilogy Revisited*, 21 PERSONALITY & SOC. PSYCHOL. BULL. 1139 (1995); Duncan, *supra* note 17, at 591.

22. For a fuller discussion, see Richardson, *supra* note 3, at 2043–52.

23. While this section will discuss findings from studies related to implicit social cognitions, other social psychological literature also supports these biases. See, e.g., Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going To Believe?* Scott v. Harris and the Perils of Cognitive Illiberalism, 122 HARV. L. REV. 837, 842–43 (2009) (noting that “[s]ocial psychology teaches us that our perceptions of fact are pervasively shaped by our commitments to shared but contested views of individual virtue and social justice. It also tells us that although our ability to perceive this type of value-motivated cognition in others is quite acute, our power to perceive it in ourselves tends to be quite poor.”).

24. See Duncan, *supra* note 17, at 592.

25. Duncan, *supra* note 17, at 595.

26. *Id.*

27. *Id.*

28. *Id.*

aggressive rose to an incredible 75%.²⁹ The researchers concluded that negative black stereotypes affected the subjects' interpretation of the ambiguous behavior.³⁰

Other research replicates these findings that the threshold for labeling ambiguous behavior as aggressive or violent is lower for Blacks than for Whites.³¹ One of these studies demonstrated that these effects hold true for black perceivers as well as white.³² In that study, the researchers had black and white sixth-grade students rate the ambiguous behaviors of individuals in four different scenarios. Two involved physical contact (a bump in the hallway and poking a student in a classroom) and two did not (requesting food from another student and taking another's pencil without asking).³³ The results not only provided "clear evidence that even relatively innocuous acts by black males are likely to be considered more threatening than the same behaviors by white males," but also that the "behavior ratings by black students reflected the same antiblack bias as those by white students."³⁴

A particularly disturbing series of studies relates to "shooter bias." Shooter bias refers to research findings that individuals in experimental settings, including the police, more quickly shoot an unarmed black person than an armed white person.³⁵ In one study, researchers asked subjects to shoot armed individuals and to refrain from shooting unarmed individuals using buttons labeled "shoot" and "don't shoot."³⁶ The results demonstrated that implicit biases caused individuals to shoot potentially hostile black individuals more quickly than potentially hostile white

29. *Id.*

30. *Id.* at 597.

31. Kurt Hugenberg & Galen V. Bodenhausen, *Ambiguity in Social Categorization: The Role of Prejudice and Facial Affect in Race Categorization*, 15 PSYCHOL. SCI. 342, 342–45 (2004) [hereinafter Hugenberg & Bodenhausen, *Ambiguity*] (finding that subjects evaluated the same facial expression as more hostile on a black face than on a white face); H. Andrew Sager & Janet Ward Schofield, *Racial and Behavioral Cues in Black and White Children's Perceptions of Ambiguously Aggressive Acts*, 39 J. PERSONALITY & SOC. PSYCHOL. 590, 593, 596 (1980) (finding that black and white school-age children rated an ambiguous bump in the hallway as more aggressive when performed by a black actor rather than a white actor); see also Kurt Hugenberg & Galen V. Bodenhausen, *Facing Prejudice: Implicit Prejudice and the Perception of Facial Threat*, 14 PSYCHOL. SCI. 640, 643 (2003) [hereinafter Hugenberg & Bodenhausen, *Facing Prejudice*] (demonstrating that implicit bias scores predicted how long it took white participants to judge when a hostile expression on a black face became non-hostile).

32. Sager & Schofield, *supra* note 31, at 596.

33. *Id.* at 593.

34. *Id.* at 596.

35. Joshua Correll, Bernadette Park, Charles M. Judd & Bernd Wittenbrink, *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1317–18 (2002).

36. *Id.* at 1316; see also B. Keith Payne, *Weapon Bias: Split-Second Decisions and Unintended Stereotyping*, 15 CURRENT DIRECTIONS IN PSYCHOL. SCI. 287 (2006) (noting that split-second decisions limit individual ability to control for racial bias caused by racial stereotypes).

individuals.³⁷ Although both civilians and police officers exhibit shooter bias, evidence exists that police officers perform better than civilians do.³⁸

The effects of implicit biases are not limited to the interpretation of ambiguous behaviors, but can also affect how individuals interpret ambiguous facial expressions. In one study, researchers created brief movie clips in which a computer-generated face changed from unambiguously happy to unambiguously hostile.³⁹ They then asked subjects to determine when the expression changed from happy to hostile.⁴⁰ Subjects with higher implicit bias scores more quickly interpreted a black individual's ambiguous facial expression as hostile than those with lower implicit bias scores.⁴¹ Implicit bias scores had no effect on perceptions of anger on white faces.⁴²

In a follow-up experiment, the same researchers created movie clips in which a computer generated expression changed from unambiguously hostile to unambiguously happy.⁴³ Not surprisingly, individuals with the higher implicit bias scores interpreted ambiguously hostile facial expressions as lingering longer on black faces than those with lower scores did.⁴⁴ Again, the implicit bias score had no effect on the interpretation of ambiguous emotions on white faces.⁴⁵

Another behavioral effect of implicit bias of relevance to police-citizen interactions is "attentional bias." This phrase refers to research findings that people's attention is drawn more quickly to Blacks, especially young black men, than to Whites.⁴⁶ While this can occur consciously, it also happens nonconsciously and automatically.⁴⁷ Researchers believe that this bias is related to the fact that

37. Correll et al., *supra* note 35, at 1317–18.

38. Joshua Correll, Bernadette Park, Charles M. Judd, Bernd Wittenbrink, Melody S. Sadler & Tracie Keese, *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision To Shoot*, 92 J. PERSONALITY & SOC. PSYCHOL. 1006, 1020–22 (2007) (finding that officers do not exhibit shooter bias to the same extent as civilians and suggesting that extensive training explains this result) [hereinafter Correll et al., *Thin Blue Line*]. For a fuller discussion, see *infra* notes 151–53 and accompanying text.

39. Hugenberg & Bodenhausen, *Facing Prejudice*, *supra* note 31, at 640.

40. *Id.* at 641–42.

41. *Id.* at 642.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*; see also Hugenberg & Bodenhausen, *Ambiguity*, *supra* note 31, at 342–45 (finding that subjects with high implicit bias scores were more likely to categorize an ambiguous individual as black as opposed to white when the expression was unambiguously hostile versus happy).

46. Trawalter et al., *supra* note 21, at 1324.

47. Eberhardt et al., *supra* note 21, at 881, 883, 885–87 (finding that research subjects, primed with crime-related words or photographs below the level of conscious awareness, were drawn to black faces earlier and for longer time periods than to white faces). Researchers have also found that individuals' motivations can nonconsciously affect visual perceptions, causing individuals to interpret ambiguous figures in a manner consistent with their desires. See Emily Balcetis & David Dunning, *See What You Want To See: Motivational Influences on Visual Perception*, 91 J. PERSONALITY & SOC. PSYCHOL. 612 (2006).

people nonconsciously and automatically find black men threatening.⁴⁸ This hypothesis is strengthened by neuroscientific findings that people show more activation of the amygdala, a portion of the brain associated with fear, when viewing faces of black men versus white men.⁴⁹ It is notable that conscious racial bias does not predict attentional bias.⁵⁰ What is predictive is how strongly the individual nonconsciously associates Blacks and danger.⁵¹

These behavioral effects of implicit bias have implications for police-citizen interactions, especially those initiated by the police in order to investigate potentially criminal behavior. In *Terry v. Ohio*,⁵² the Supreme Court sanctioned police investigations of individuals based on nothing more than an officer's "reasonable suspicions." The problem is that implicit biases may cause police officers to pay more attention to Blacks than to Whites and to interpret the behaviors of Blacks as suspicious more readily than the identical behaviors of Whites. This leads to inefficient and arbitrary policing. Part II will discuss the reasonable suspicion test and its shortcomings.

48. Trawalter et al., *supra* note 21, at 1324.

49. See, e.g., Matthew D. Lieberman, Ahmad Hariri, Johanna M. Jarcho, Naomi I. Eisenberger & Susan Y. Bookheimer, *An fMRI Investigation of Race-Related Amygdala Activity in African-American and Caucasian-American Individuals*, 8 NATURE NEUROSCI. 720 (2005). The strength of amygdala activation correlates with implicit bias scores related to racial attitudes. Elizabeth A. Phelps, Kevin J. O'Connor, William A. Cunningham, E. Sumie Funayama, J. Christopher Gatenby, John C. Gore & Mahzarin R. Banaji, *Performance on Indirect Measures of Race Evaluation Predicts Amygdala Activation*, 12 J. COGNITIVE NEUROSCI. 729, 730–33 (2000). Researchers found stronger amygdala responses when they presented the pictures of black faces subliminally. William A. Cunningham, Marcia K. Johnson, Carol L. Raye, J. Chris Gatenby, John C. Gore & Mahzarin R. Banaji, *Separable Neural Components in the Processing of Black and White Faces*, 15 PSYCHOL. SCI. 806, 809 (2004) (finding that the stronger reactions were correlated significantly with scores from the Implicit Association Test (IAT)—a test which reveals implicit biases); see also Allen J. Hart, Paul J. Whalen, Lisa M. Shin, Sean C. McInerney, Hakan Fischer & Scott L. Rauch, *Differential Response in the Human Amygdala to Racial Outgroup vs Ingroup Face Stimuli*, 11 NEUROREP. 2351 (2000) (demonstrating that subjects showed greater amygdala activation to outgroup faces); Andreas Olsson, Jeffrey P. Ebert, Mahzarin R. Banaji & Elizabeth A. Phelps, *The Role of Social Groups in the Persistence of Learned Fear*, 309 SCI. MAG. 785, 785–86 (2006) (demonstrating that humans more readily show a fear response to outgroup members); Damian Stanley, Elizabeth Phelps & Mahzarin Banaji, *The Neural Basis of Implicit Attitudes*, 17 CURRENT DIRECTIONS IN PSYCHOL. SCI. 164, 165 (2008) (noting that amygdala activation is associated with fear); cf. Mary E. Wheeler & Susan T. Fiske, *Controlling Racial Prejudice: Social-Cognitive Goals Affect Amygdala and Stereotype Activation*, 16 PSYCHOL. SCI. 56 (2005) (demonstrating that amygdala activation to outgroup members is not inevitable). Researchers have also found that a variety of physiological responses occur when Whites are exposed to Blacks, including sweating, increased heart rate, facial twitches, and increased eye blink. Jennifer L. Eberhardt, *Imaging Race*, 60 AM. PSYCHOL. 181, 183 (2005).

50. See Eberhardt et al., *supra* note 21, at 884–85.

51. Nicole C. Donders, Joshua Correll & Bernd Wittenbrink, *Danger Stereotypes Predict Racially Biased Attentional Allocation*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 1328, 1332 (2008).

52. 392 U.S. 1 (1968).

II. THE DOCTRINE

The reasonable suspicion standard was first articulated in *Terry v. Ohio*.⁵³ In *Terry*, Officer McFadden became suspicious of two individuals who appeared to be casing a joint in preparation for a daytime robbery.⁵⁴ Acting on his suspicions, but without probable cause, Officer McFadden stopped the individuals and frisked them for weapons.⁵⁵ He found a concealed weapon on Terry and arrested him.⁵⁶

The Supreme Court held that probable cause was no longer the gold standard governing when officers could seize and search individuals. Rather, in recognizing that it was “deal[ing] here with an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat,”⁵⁷ the Court introduced a lower standard, reasonable suspicion, to regulate stops and frisks that were less intrusive than full-blown searches and arrests. With this new standard, the Court intended to give officers the flexibility to investigate potential criminal activity in myriad situations while simultaneously ensuring that they were not given free rein to encroach upon justifiable privacy.⁵⁸

The reasonable suspicion standard allows an officer to act when he observes “unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous”⁵⁹ However, in order to protect individuals against arbitrary government conduct, the standard prohibits officers from acting upon “inchoate and unparticularized suspicion[s] or ‘hunch[es].’”⁶⁰ Rather, officers must gather specific, individualized, and objective facts that demonstrate a sufficient probability of criminal activity before conducting a *Terry* seizure.⁶¹

53. *Id.* at 10.

54. *Id.* at 6.

55. *Id.* at 7, 25–26.

56. *Id.* at 7.

57. *Id.* at 20.

58. *Delaware v. Prouse*, 440 U.S. 648, 653–54 (1979) (“The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of ‘reasonableness’ upon the exercise of discretion by government officials, including law enforcement agents, in order ‘to safeguard the privacy and security of individuals against arbitrary invasions. . . . [sic]’” (footnote omitted)).

59. *Terry*, 392 U.S. at 30.

60. *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (quoting *Terry*, 329 U.S. at 27); see also *United States v. Chavez-Valenzuela*, 268 F.3d 719, 724 (9th Cir. 2001) (a hunch “cannot withstand scrutiny under the Fourth Amendment”); *United States v. Salzano*, 158 F.3d 1107, 1111 (9th Cir. 1998) (“[i]nchoate suspicions and unparticularized hunches” are not reasonable suspicion (quoting *United States v. Wood*, 106 F.3d 942, 946 (10th Cir. 1997))).

61. See *Sokolow*, 490 U.S. at 7 (The “level of suspicion is considerably less than proof of wrongdoing by a preponderance of the evidence.”); *New Jersey v. T.L.O.*, 469 U.S. 325, 346 (1985) (“[T]he requirement of reasonable suspicion is not a requirement of absolute certainty.”); *United States v. Cortez*, 449 U.S. 411, 417 (1981) (“But the essence of all that has been written is that the totality of the circumstances—the whole picture—must be taken into account.”); C.M.A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence*,

In assessing whether the facts articulated by the officer give rise to a reasonable inference of criminality, courts use an objective standard, asking “would the facts available to the officer at the moment of the seizure or the search ‘warrant a man of reasonable caution in the belief’ that the action taken was appropriate?”⁶² This is a two-step analysis. First, courts determine the facts upon which the officer relied.⁶³ I will refer to this as the “articulation requirement” because *Terry* obliges officers to state the facts that led them to feel suspicious. Next, courts decide whether “these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion.”⁶⁴ This is a mixed question of law and fact, and the “issue is whether the facts satisfy the [relevant] . . . [constitutional] standard.”⁶⁵

In its review of the facts, a court must give “due weight . . . to the specific reasonable inferences which [an officer] is entitled to draw from the facts in light of his experience.”⁶⁶ The Supreme Court justifies this deference on the common sense belief that “a trained officer draws inferences and makes deductions [from facts] . . . that might well elude an untrained person.”⁶⁷ Hence, I will refer to this second step as the “deference requirement.” As will be discussed next, the operation of implicit social cognitions undermines the articulation and the deference requirements meant to prevent arbitrary intrusions on individual privacy.

A. Articulation Problem

In order to protect individuals from arbitrary policing, the *Terry* doctrine requires officers to base their suspicions on specific and particular facts, not inarticulable hunches.⁶⁸ One purpose of the articulation requirement is to prevent policing based upon stereotypes of criminality.⁶⁹ However, this safeguard, as currently understood, is ineffectual because of the operation of implicit social cognitions.

or *Constitutional Guarantees?*, 35 VAND. L. REV. 1293, 1301 (1982) (a preponderance is “something just over fifty percent”).

62. *Terry*, 392 U.S. at 21–22.

63. *See Ornelas v. United States*, 517 U.S. 690, 696 (1996).

64. *Id.*

65. *Id.* (alterations in original) (quoting *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982)).

66. *See Terry*, 392 U.S. at 27. Professor Jerome Skolnick, a recognized expert on policing practices, notes that police officers by necessity often develop “symbolic assailants” in order to identify potential criminals. JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY* 45–46, 217–18 (1966). Often this “symbolic assailant” is associated with black men. *Id.* at 49.

67. *United States v. Cortez*, 449 U.S. 411, 418 (1981); *see also Ornelas*, 517 U.S. at 699 (“[A] reviewing court should take care . . . to give due weight to inferences drawn from those facts by . . . local law enforcement officers . . . through the lens of his police experience and expertise.”); *Brown v. Texas*, 443 U.S. 47, 52 n.2 (1979) (deference is due to the “observations of a trained, experienced police officer who is able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer”).

68. *See Terry*, 392 U.S. at 27.

69. *See id.* at 12 & n.7, 14 & n.11.

A *Terry* stop will occur only after an officer interprets an individual's ambiguous actions as suspicious.⁷⁰ *Terry* stops are limited to ambiguous behaviors because if the behaviors were unambiguously criminal, probable cause would exist, eliminating the need to rely upon the reasonable suspicion standard. The science of implicit social cognition provides compelling evidence that implicit racial bias can affect both who will capture an officer's attention⁷¹ and whether an officer will interpret the individual's behaviors as criminal.⁷²

In *Terry*, for instance, Officer McFadden became suspicious when he saw Terry and another gentleman standing on a street corner during the afternoon in downtown Cleveland.⁷³ He stated that they just "didn't look right"⁷⁴ to him, although he could not articulate "precisely what first drew his eye to them."⁷⁵ "[T]o be truthful," he admitted, he just "didn't like them."⁷⁶ Assuming that Officer McFadden was being truthful,⁷⁷ implicit bias can explain why the two men, both of whom were Black, captured McFadden's attention despite his inability to articulate why. Only after his attention was drawn to the two men did McFadden observe ambiguous behavior that he interpreted as indicative of people casing a joint in preparation for a daytime robbery. Based upon his observations, Officer McFadden stopped and frisked Terry and found a concealed weapon.⁷⁸

In order to demonstrate that the stop and frisk was not based upon a hunch, McFadden articulated the specific and individualized facts that led him to conduct it. However, this articulation does not safeguard against stops based upon racial hunches. Because implicit biases are nonconscious, McFadden would be unaware that race affected not only who captured his attention, but also his interpretation of the actions he observed. Once he felt suspicious, he could easily point to the specific facts that he believed made him suspicious without realizing that his feelings might have been triggered by a racial hunch caused by the operation of implicit social cognitions. In other words, Officer McFadden would not realize that

70. See McCauliff, *supra* note 61, at 1310 n.96 ("Criticism of the 'reasonable suspicion' standard frequently rests on the concern that 'temporary seizures for investigation will be undertaken upon the subjective judgment of police officers and that courts will be reluctant to second-guess them.'" (quoting LaFare, "Street Encounters" and the Constitution: Terry, Sibron, Peters and Beyond, 67 MICH. L. REV. 40, 73 (1968))).

71. See *supra* notes 46–51 and accompanying text.

72. See *supra* notes 23–45 and accompanying text.

73. *Terry*, 392 U.S. at 5.

74. *Id.*

75. *Id.* For McFadden's full testimony, see State of Ohio v. Richard D. Chilton and State of Ohio v. John W. Terry: *The Suppression Hearing and Trial Transcripts*, 72 ST. JOHN'S L. REV. 1387 (1998).

76. State of Ohio v. Richard D. Chilton and State of Ohio v. John W. Terry: *The Suppression Hearing and Trial Transcripts*, *supra* note 75, at 1456.

77. Terry's defense lawyer described Officer McFadden as "a guy that we really liked. He was straight. One thing about him—as a police officer, he came straight down the line. You did not have to worry about him misrepresenting what the facts were. He would come straight down the line, and as a defense lawyer I could appreciate that." Honorable Louis Stokes, *Representing John W. Terry*, 72 ST. JOHN'S L. REV. 727, 729 (1998).

78. See *Terry*, 392 U.S. at 7.

if Terry and Chilton had been white, he may not have noticed the behavior or may have interpreted it as indicative of window-shopping instead of robbery.⁷⁹

In sum, implicit biases may cause officers not only to pay more attention to Blacks than to Whites, but also to interpret identical acts differently based upon the race of the individual performing them. This demonstrates that an officer's suspicions are not necessarily based solely upon the ambiguous actions he observes. Consequently, the articulation requirement does not prevent actions based upon racial hunches caused by implicit bias.⁸⁰

B. Deference Problem

A further problem with the reasonable suspicion standard is that courts often defer to officer judgments of criminality without any criteria for determining whether deference is justifiable. Instead, courts repeatedly defer to the judgments of *all* officers, with no inquiry into the particular officer's training, experience, and skill.

Terry mandates that courts give “*due weight . . . to the specific reasonable inferences which [an officer] is entitled to draw from the facts in light of his experience.*”⁸¹ The Court justifies deference on the common sense belief that “a trained officer draws inferences and makes deductions [from facts] . . . that might well elude an untrained person.”⁸² Thus, according to the Court, police knowledge and experience “yield inferences that deserve deference.”⁸³ Yet, courts consistently fail to determine whether the inferences drawn by the officer conducting the stop are actually *entitled* to any weight. Only a review of the particular officer's judgments would give courts the information necessary to make this determination.

79. This articulation requirement is open to the same critique made by Justice Marshall in the peremptory challenge context. In his dissenting opinion in *Batson v. Kentucky*, 476 U.S. 79, 106 (1986), Justice Marshall argued that requiring prosecutors to articulate a race-neutral reason for their use of peremptory challenges would fail to prevent discriminatory jury selection practices. He argued:

A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is “sullen,” or “distant,” a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported.

Id. (Marshall, J., dissenting). Thus, he argued that peremptory challenges should be abolished. *Id.* at 107. One could make the argument that the reasonable suspicion test should be eliminated for similar reasons.

80. Importantly, I am not arguing against an articulation requirement. Rather, I argue that the articulation requirement should be strengthened. *See infra* discussion at Part III.B.

81. *Terry*, 392 U.S. at 27 (emphasis added).

82. *United States v. Cortez*, 449 U.S. 411, 418 (1981); *see cases cited supra* note 67.

83. *Ornelas v. United States*, 517 U.S. 690, 699 (1996); *see also* David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 300–01 (critiquing the *Ornelas* decision for essentially stating “that police officers should receive as much deference as trial judges”).

Deference to officer conclusions might be warranted in appropriate circumstances. After all, whether facts give rise to a reasonable suspicion is contextual.⁸⁴ As the Court recognized, “what may not amount to reasonable suspicion at a motel located alongside a transcontinental highway at the height of the summer tourist season may rise to that level in December in Milwaukee.”⁸⁵ It is impossible to catalogue the myriad factual situations in which officers make judgments of potential criminality.⁸⁶ In fact, the contextual nature of the inquiry explains why seemingly innocent conduct can form the basis of a suspicion that is reasonable.⁸⁷

Given the sheer number of situational variations that may give rise to reasonable suspicions, some deference to officer judgments may be necessary and justifiable as a matter of institutional competence. With the proper training and experience, officers may learn to make accurate judgments about when an individual’s actions denote criminality.⁸⁸ Furthermore, an appropriately trained and experienced officer is likely more proficient than the courts at determining whether a particular set of circumstances is suspicious.⁸⁹

Furthermore, de novo review may be problematic because judges will inevitably have different conceptions about what quantum of evidence is sufficient to support a reasonable suspicion. When 164 judges were asked to quantify how much evidence they felt was required to sustain a reasonable suspicion, their estimates

84. *See Ornelas*, 517 U.S. at 696 (citations omitted) (acknowledging that reasonable suspicion is a “fluid concept[] that take[s its] substantive content from the particular contexts in which the standards are being assessed”); *see also Terry*, 392 U.S. at 29 (the limitations imposed by the Fourth Amendment “will have to be developed in the concrete factual circumstances of individual cases”); *Ker v. California*, 374 U.S. 23, 33 (1963) (noting that “[t]his Court[] [has a] long-established recognition that standards of reasonableness under the Fourth Amendment are not susceptible of Procrustean application” and that “[e]ach case is to be decided on its own facts and circumstances” (internal quotation marks omitted)).

85. *Ornelas*, 517 U.S. at 699.

86. *Cortez*, 449 U.S. at 417 (“[T]hey fall short of providing clear guidance dispositive of the myriad factual situations that arise.”).

87. *See, e.g., United States v. Sokolow*, 490 U.S. 1, 10 (1989) (“We noted in *Gates*, 462 U.S., at 243–44, n.13, that ‘innocent behavior will frequently provide the basis for a showing of probable cause,’ and . . . [t]hat principle applies equally well to the reasonable suspicion inquiry.”). *See generally* Eli B. Silverman, *With a Hunch and a Punch*, 4 J.L. ECON. & POL’Y 133 (2007) (describing the contextual nature of suspicion). As the Supreme Court has stated, whether actions are indicative of “ongoing criminal behavior” or innocent conduct depends almost entirely on context, and thus, “one determination will seldom be a useful ‘precedent’ for another.” *Ornelas*, 570 U.S. at 698 (quoting *Illinois v. Gates*, 462 U.S. 213, 238 n.11 (1983)).

88. Officers should also be able to articulate the individualized facts that justify their suspicions. Hence, I am not arguing that experience and training translate into hunches that deserve automatic deference. *See, e.g.,* Craig S. Lerner, *Judges Policing Hunches*, 4 J.L. ECON. & POL’Y 25 (2007); Craig S. Lerner, *Reasonable Suspicion and Mere Hunches*, 59 VAND. L. REV. 405 (2006).

89. *But see infra* notes 99–100 and accompanying text (observing that implicit social cognitions may make officers less proficient than lay people).

ranged from 50% at the high end to 10% at the low end.⁹⁰ With these differing perceptions, it is not surprising that courts reach different results as to whether or not a reasonable suspicion exists on “strikingly similar” facts.⁹¹

Even if judges agreed on the quantum of evidence question, they might still assign different weights to the historical facts or evaluate them differently, as is evident from dissenting opinions or reversals on appeal in *Terry* cases. For instance, in *United States v. Erwin*,⁹² whether or not a reasonable suspicion existed turned on the court’s interpretation of the defendant’s movements in an airport. The majority interpreted the defendant’s movements as evasive, while the dissent attributed the defendant’s circuitous route in the airport to his desire to avoid a picket line.⁹³

Asking courts to engage in de novo review of an officer’s fact-specific and contextual judgments of criminality to determine if the officer’s interpretation of ambiguous facts is reasonable has resulted in a body of cases that is a “hopeless clutter.”⁹⁴ As a question of institutional competence, then, some deference to officer inferences may be appropriate. The problem, however, is that courts have no criteria for determining when and how much deference to an officer’s judgment is appropriate. The danger is not only that courts will defer when they should not, but also that they will fail to defer when they should.

Importantly, I am not arguing against de novo review. Review of officers’ articulations is critically important to ensuring that officers are not basing stops on illusory or inappropriate criteria. However, blind deference to all police officer judgments does little to protect against arbitrary policing.

Deference is based on the assumption that all officers have the experience and training required to give them the qualifications necessary to make judgments of criminality with some accuracy. There are two problems with this assumption. First, it is incorrect. Yet, only rarely do courts engage in any serious inquiry into an officer’s actual training and experience. When they do, they often assume that there is a relationship between training and experience on the one hand, and the ability to make accurate judgments of criminality on the other. Second, courts do not account for individual differences in officer abilities to make accurate inferences of criminality. Rather than engaging in any analysis about how much weight an officer’s inferences are due, courts typically defer to most officers, not just those who may merit it. These two points are discussed next.

90. Forty-nine quantified it at 30%, thirty-three quantified it at 20%, twenty-four at 10%, twenty-one at 40%, and twenty-three at 50%. McCauliff, *supra* note 61, at 1327–28. The average percentage for reasonable suspicion was 29.59% out of the 164 judges. *Id.* at 1332.

91. See *Sokolow*, 490 U.S. at 14 (Marshall, J., dissenting) (pointing out that in *Reid v. Georgia*, 448 U.S. 438, 441 (1980), the Court found insufficient facts for reasonable suspicion despite the fact that the case involved “strikingly similar” facts.).

92. 803 F.2d 1505 (9th Cir. 1986).

93. See *id.* at 1511 (majority opinion); *id.* at 1512 (Wiggins, J., dissenting).

94. Lerner, *Reasonable Suspicion and Mere Hunches*, *supra* note 88, at 415.

1. Training and Experience

Courts often defer to officer inferences of criminality based upon the assumption that their experiences and training are meaningful. However, they rarely engage in any serious attempt to think through what types of experience and training are significant in the reasonable suspicion context. In fact, courts rarely inquire into an officer's experience at all. Chief Judge Ginsburg of the Court of Appeals for the District of Columbia "uncovered no case in which a federal court engaged in a more searching review of a *Terry* stop because of a rookie officer's lack of experience."⁹⁵ Most courts simply equate the status of being a police officer as connoting the experience necessary to justify deference to the officer's judgments.

This mistake is exemplified in *Terry*. The *Terry* Court viewed Officer McFadden's actions as consistent with good police work based upon his experience.

[McFadden] testified that he had been a policeman for 39 years and a detective for 35 and that he had been assigned to patrol this vicinity of downtown Cleveland for shoplifters and pickpockets for 30 years. He explained that he had developed routine habits of observation over the years and that he would "stand and watch people or walk and watch people at many intervals of the day."⁹⁶

The Court concluded, "[i]t would have been poor police work indeed for an officer of 30 years' experience in the detection of thievery from stores in this same neighborhood to have failed to investigate this behavior further."⁹⁷ However, this conclusion only makes sense in hindsight since Officer McFadden found Terry in possession of a weapon.

Although Officer McFadden's suspicions concerning Terry's behavior were confirmed, the result tells us virtually nothing about Officer McFadden's competence as an officer. McFadden's actions are equally consistent with luck. McFadden admitted that he had no experience watching people casing joints for daytime robberies.⁹⁸ Thus, his suspicions concerning Terry's and Chilton's behaviors were not based upon any prior relevant experience. Furthermore, the Court had no information concerning any training McFadden had received that was relevant to his conclusion that Terry was preparing for a daytime robbery. McFadden's decision to stop Terry could have been based simply upon his assumptions about how people casing a joint might act. If this is the case, his conclusions are not entitled to any weight. His actions only seem consistent with good police work because his suspicions just happened to be correct on this occasion. Yet, absent information concerning Officer McFadden's competence to

95. Douglas H. Ginsburg, *Of Hunches and Mere Hunches: Two Cheers for Terry*, 4 J.L. ECON. & POL'Y 79, 86 (2007).

96. *Terry v. Ohio*, 392 U.S. 1, 5 (1968).

97. *Id.* at 23.

98. See *State of Ohio v. Richard D. Chilton and State of Ohio v. John W. Terry: The Suppression Hearing and Trial Transcripts*, *supra* note 75, at 1420.

make accurate inferences of criminality from ambiguous behaviors, the fact that he turned out to be right this time is essentially meaningless.

Furthermore, Terry's and Chilton's race may have triggered implicit biases that affected McFadden's interpretation of their behavior as suspicious. For all the Court knew, perhaps McFadden had stopped dozens of other black individuals who "didn't look right" who turned out to be innocent of any wrongdoing. Without more information concerning Officer McFadden's hit rates, it is simply impossible to determine whether his experiences as an officer were meaningful to his ability to make accurate judgments of criminality based upon ambiguous facts on this occasion.

Where the interpretation of ambiguous behavior by non-Whites is concerned, the relationship between experience (understood as years served on the police force) and the ability to make accurate inferences of criminality is tenuous at best. Empirical evidence suggests that officers are more likely to be influenced by implicit racial bias than civilians are because the nature of officers' jobs requires them to think about crime constantly. Compelling research by Stanford psychologist Jennifer Eberhardt demonstrates that simply thinking about the concept of crime triggers implicit racial biases in police officers.⁹⁹ Based upon her research, she concluded that "[n]ot only are Blacks thought of as criminal, but also crime is thought of as Black."¹⁰⁰

Furthermore, courts imbue experience with meaning, "notwithstanding the complete lack of empirical evidence that experience in policing is a good proxy for accuracy in hunching."¹⁰¹ In *Florida v. Rodriguez*,¹⁰² for instance, the Supreme Court concluded that an officer's suspicions were reasonable because he "had special training in narcotics surveillance and apprehension."¹⁰³ That training included

40 hours of narcotics training in the police academy and, after being assigned to the Narcotics Squad, a 5-week course from the Organized Crime Bureau, which included one-and-one-half to two weeks of training in narcotic surveillance and drug identification. He had received further training under the auspices of the Drug Enforcement Administration, and at the time of his testimony he had 18 months' experience with the airport unit.¹⁰⁴

99. Eberhardt et al., *supra* note 21, at 877–78.

100. *Id.* at 883.

101. Ginsburg, *supra* note 95, at 85; see also Andrew E. Taslitz, *Police Are People Too: Cognitive Obstacles to, and Opportunities for, Police Getting the Individualized Suspicion Judgment Right*, 8 OHIO ST. J. CRIM. L. 7, 10 (2010) (arguing that "[a]ny concept of reasonable suspicion . . . that tolerates massive false negative rates—frequent invasions of privacy, property, and locomotive rights that ensnare the apparently innocent—is a flawed conception. The costs imposed on communities and individuals become great, while little in the way of crime-control efforts is achieved.").

102. 469 U.S. 1 (1984).

103. *Id.* at 6.

104. *Id.* at 3.

The mere fact of training is of little probative value when not coupled with any evidence that the particular training an officer received is related to making accurate judgments of criminality or that the training helped this particular officer with his judgments.¹⁰⁵ Yet, even without this evidence, courts are encouraged to allow “officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them.”¹⁰⁶

An officer’s experience can affect the accuracy of his inferences, but not in the way courts assume. Counterintuitively, an inverse relationship may actually exist between experience and accuracy. Police officers often engage in proactive policing in urban, poor, majority-black neighborhoods. Research demonstrates that officers who work in urban environments have higher levels of implicit racial bias than those working in other neighborhoods.¹⁰⁷ In fact, one study revealed that similarly situated neighborhoods are viewed as more disorderly when they are majority black versus majority white.¹⁰⁸ Thus, officers whose primary experience is based on proactive policing in urban, poor, and majority-black neighborhoods may have higher levels of implicit bias which can result in them being less accurate than officers whose primary experience consists of work in other neighborhoods. An officer’s experience alone, therefore, may be a poor proxy for accuracy.

105. In his concurring opinion in *United States v. Mendenhall*, Justice Powell referred to the officer’s experience and training without any discussion of how they related to the officer’s ability to discern criminal from noncriminal acts. 446 U.S. 544, 563–64 (1980) (Powell, J., concurring). He wrote,

In all situations the officer is entitled to assess the facts in light of his experience. The two officers who stopped the respondent were federal agents assigned to the Drug Enforcement Administration. Agent Anderson, who initiated the stop and questioned the respondent, had 10 years of experience and special training in drug enforcement. He had been assigned to the Detroit Airport, known to be a crossroads for illicit narcotics traffic, for over a year and he had been involved in approximately 100 drug-related arrests.

Id. at 564 (citations omitted) (internal quotation marks omitted) (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 885 (1975)). Many lower court decisions make the same mistake. *See, e.g.*, *State v. Calmese*, No. 1 CA-CR 07-0243, 2008 WL 3863900, at *5 (Ariz. Ct. App. Mar. 27, 2008) (considering officers’ training, length of time served as a police officer, and number of stops that led to drug investigations); *People v. Prince*, No. A114480, 2007 WL 1705658, at *4 (Cal. Ct. App. June 14, 2007) (considering the officer’s thirty-two years of experience as a police officer); *State v. Scheller*, No. 4-123/03-1279, 2004 Iowa App. LEXIS 592, at *2 (Iowa Ct. App. Apr. 14, 2004) (referencing the officer’s eighteen years on the police force); *State v. Gonzales*, No. A05-2151, 2007 WL 46029, at *3 (Minn. Ct. App. Jan. 9, 2007) (considering years as a police officer, number of traffic stops, and number of drug arrests); *State v. Long*, 303 S.W.3d 198, 200 (Mo. Ct. App. 2010) (considering the fact that the officer had received specialized training in narcotics investigations); *State v. Kehm*, 724 N.W.2d 88, 91, 96 (Neb. Ct. App. 2006) (concluding that the officer’s experience included making “a number of arrests”).

106. *United States v. Arvizu*, 534 U.S. 266, 273 (2002).

107. *See Correll et al., Thin Blue Line*, *supra* note 38.

108. Robert J. Sampson & Stephen W. Raudenbush, *Seeing Disorder: Neighborhood Stigma and the Social Construction of “Broken Windows,”* 67 SOC. PSYCHOL. Q. 319 (2004).

2. Individual Officer Differences

Courts assume that officers are equally proficient at making judgments of criminality, which explains why most courts do not inquire into an individual officer's experience and ability to make these judgments.¹⁰⁹ Deference, then, is based solely upon the belief that because of their experience as officers, they will be good at making judgments of criminality. While this may be true for some officers, it is certainly not true of all officers. In fact, empirical evidence demonstrates that individual differences exist, both in the level of implicit bias an officer might have as well as in the officer's ability to make accurate judgments of criminality.¹¹⁰

Implicit social cognition research suggests that individual differences exist with regard to both the presence and the strength of implicit bias.¹¹¹ For instance, in their review of the results of 600,000 studies testing implicit biases, researchers found that while both Whites and Blacks show nonconscious preferences for Whites, Blacks showed a weaker preference than Whites did.¹¹² Furthermore, "personal standards" can affect the strength of implicit bias.¹¹³ For example, self-identified liberals seem to show "somewhat" weaker implicit bias than conservatives,¹¹⁴ "high-prejudice individuals are more likely than low-prejudice individuals to activate and apply stereotypic information,"¹¹⁵ and people committed to egalitarian goals may be able to control implicit stereotype activation better than those who are not.¹¹⁶ Remarkably, people who are highly motivated to be nonprejudiced may be

109. *But see* State v. Warren, 718 N.E.2d 936, 938–41 (Ohio Ct. App. 1998) (finding no reasonable suspicion in part because the officer "never elaborated on his experience").

110. For a discussion of how quick, intuitive judgments are often wrong because of the influence of cognitive biases, see Taslitz, *supra* note 101, at 14–31.

111. See Lorella Lepore & Rupert Brown, *Category and Stereotype Activation: Is Prejudice Inevitable?*, 72 J. PERSONALITY & SOC. PSYCHOL. 275 (1997); Margo J. Monteith, Jeffrey W. Sherman & Patricia G. Devine, *Suppression as a Stereotype Control Strategy*, 2 PERSONALITY & SOC. PSYCHOL. REV. 63, 72 (1998) (citing Russell H. Fazio, Joni R. Jackson, Bridget C. Dunton & Carol J. Williams, *Variability in Automatic Activation as an Unobtrusive Measure of Racial Attitudes: A Bona Fide Pipeline?*, 69 J. PERSONALITY & SOC. PSYCHOL. 1013 (1995)); Bernd Wittenbrink, Charles M. Judd & Bernadette Park, *Evidence for Racial Prejudice at the Implicit Level and Its Relationship with Questionnaire Measures*, 72 J. PERSONALITY & SOC. PSYCHOL. 262 (1997).

112. See Nosek et al., *supra* note 19, at 102, 105.

113. See *id.* at 106 (citing Gordon B. Moskowitz, Peter M. Gollwitzer, Wolfgang Wasel & Bernd Schaal, *Preconscious Control of Stereotype Activation Through Chronic Egalitarian Goals*, 77 J. PERSONALITY & SOC. PSYCHOL. 167 (1999)).

114. See *id.* The authors cite to another study that demonstrated "a relationship between rigidity in thinking, right-wing ideology, and conscious and unconscious attitudes toward a variety of social groups (i.e., Black, Jewish, poor, gay, and foreign)." *Id.*

115. Hugenberg & Bodenhausen, *Ambiguity*, *supra* note 31, at 342.

116. See, e.g., Leslie R. M. Hausmann & Carey S. Ryan, *Effects of External and Internal Motivation to Control Prejudice on Implicit Prejudice: The Mediating Role of Efforts to Control Prejudiced Responses*, 26 BASIC & APPLIED SOC. PSYCHOL. 215, 222 (2004) (finding that those with internal motivations to be nonprejudiced show decreased implicit biases compared to those who are only externally motivated); Michael Johns, Jerry Cullum, Tonya

able to avoid the effects of nonconscious biases on their behavior altogether.¹¹⁷ Finally, exposure and contact with non-Whites also influences implicit biases.¹¹⁸

Empirical evidence further demonstrates that officers differ in their ability to make judgments of criminality. In one study, two economists studied data from all highway stops and searches on Florida highways conducted by the Florida State Patrol from January 2000 to November 2001.¹¹⁹ The authors tested whether troopers of different races engaged in the same search patterns.¹²⁰ What they found “soundly reject[ed] the hypothesis that troopers of different races are monolithic in

Smith & Scott Freng, *Internal Motivation to Respond Without Prejudice and Automatic Egalitarian Goal Activation*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 1514 (2008); William W. Maddux, Jamie Barden, Marilynn B. Brewer & Richard E. Petty, *Saying No to Negativity: The Effects of Context and Motivation To Control Prejudice on Automatic Evaluative Responses*, 41 J. EXPERIMENTAL SOC. PSYCHOL. 19, 32–33 (2005); Gordon B. Moskowitz, Peter M. Gollwitzer, Wolfgang Wasel & Bernd Schaal, *Preconscious Control of Stereotype Activation Through Chronic Egalitarian Goals*, 77 J. PERSONALITY & SOC. PSYCHOL. 167 (1999). A related discussion of how individuals whose “cultural orientation . . . prizes egalitarianism and social solidarity” can affect the interpretation of ambiguous acts. See Kahan et al., *supra* note 23, at 841. The authors had 1350 Americans view a videotape of a high-speed police chase that resulted in the driver becoming a quadriplegic after the police officer “deliberately rammed [plaintiff’s] vehicle at the end of a high-speed chase, causing it to flip over an embankment and crash.” *Id.* at 839. The authors found that “African Americans, low-income workers, and residents of the Northeast . . . tended to form more pro-plaintiff views of the facts than did the Court. So did individuals who characterized themselves as liberals and Democrats.” *Id.* at 841.

117. Monteith et al., *supra* note 111, at 73–75 (citing studies).

118. Nilanjana Dasgupta, *Mechanisms Underlying the Malleability of Implicit Prejudice and Stereotypes: The Role of Automaticity and Cognitive Control*, in HANDBOOK OF PREJUDICE, STEREOTYPING, AND DISCRIMINATION 272 (Todd D. Nelson ed., 2009) (“[L]ong-term immersion in counterstereotypic social contexts may reduce the default accessibility of stereotypes or enhance the chronic accessibility of counterstereotypes, thereby decreasing the likelihood of biased automatic judgments and evaluations in the future.”); Cf. Nilanjana Dasgupta & Luis M. Rivera, *When Social Context Matters: The Influence of Long-Term Contact and Short-Term Exposure to Admired Outgroup Members on Implicit Attitudes and Behavioral Intentions*, 26 SOC. COGNITION 112, 119–20 (2008) (those with a great deal of prior contact with outgroup members—in this case, gays and lesbians—showed less outgroup bias regardless of the situational manipulation in the laboratory).

119. Shamena Anwar & Hanming Fang, *An Alternative Test of Racial Prejudice in Motor Vehicle Searches: Theory and Evidence*, 96 AM. ECON. REV. 127, 141 (2006). The data consisted of information for “906,339 stops and 8,976 searches conducted by a total of 1,469 troopers.” Of the stops considered, 66.5% were carried out against white motorists, 17.3% against Hispanic motorists, and 16.2% against black motorists. *Id.* Of the 8976 searches conducted, 54.6% were performed on Whites, 23.4% percent on Hispanics, and 22.1% on Blacks. *Id.* Slightly over 79% of the searches were unsuccessful. Drugs were the most common contraband found—15.1% of total searches—followed by alcohol/tobacco (2.1%) and drug paraphernalia (1.5%). Of the police officers, 76.3% were white, 13.7% were black, 10% Hispanic, 89% were male. White troopers conducted 73% of the stops, 86% of all searches; black officers conducted 16% of stops and 4.6% searches. Finally, Hispanic officers conducted 11.4% of stops and 9.5% of searches. *Id.*

120. *Id.* at 147. The researchers reweighted the sample so that all troopers faced the same racial population of motorists. *Id.* at 140.

their search behavior.”¹²¹ For any given motorist, the average search success rate for black and Hispanic officers was higher than that of white officers.¹²² Similar results were obtained in a study examining the practices of the Los Angeles Police Department. Researchers found that “[t]he black arrest disparity was nine percentage points lower when the stopping officer was black than when the stopping officer was non-black.”¹²³

Professor Max Minzner reviewed the data from the Florida State Police Department study.¹²⁴ He found differences among individual officers in their search success rates. As he put it,

Between January 2000 and September 2001, each [officer] performed a similar number of probable-cause searches of automobiles: Officer A conducted eighteen searches, while Officer B conducted fifteen searches. When Officer A thought he was likely to recover evidence, he was almost always wrong. Only one of his eighteen searches led to a seizure—a success rate of 5.6%. Officer B, by contrast, was almost always right. He recovered evidence in thirteen of the fifteen searches, for an 86.7% success rate.¹²⁵

While this evidence relates to probable cause searches, there is no reason to think that these individual differences would disappear in searches based upon the lower standard of reasonable suspicion.

Additional evidence confirming individual officer differences comes from research by Dr. Eli Silverman, Emeritus Professor at John Jay College of Criminal Justice. His observations led him to conclude that

[l]ike other individuals within the same occupation, police vary in their ability to make intelligent, intuitive choices. Just as it varies among the general population, some police are better than others in detecting patterns from experience. Research and empirical observation amply demonstrates [sic] that there is a wide range in the ability of police officers to successfully deploy reasonable hunches in their work. Some officers, for example, are far better at spotting a hidden gun on a

121. *Id.* at 147.

122. *Id.* at 144. Furthermore, for all officers, the average search success rate was highest against Whites, followed by Blacks, and then Hispanics. For instance, black officers search about the same percentage of white and Hispanic motorists (.27% and .28%), but their average success rate against white motorists was much higher than that for Hispanic motorists (39.4% versus 21.0%). *Id.* at 145.

123. Ian Ayres & Jonathan Borowsky, *A Study of Racially Disparate Outcomes in the Los Angeles Police Department* 28 (Oct. 2008), <http://www.aclu-sc.org/documents/view/47>. Importantly, however, the researchers assumed that “officers are less likely to engage in racially biased policing against members of their own race.” *Id.* This, of course, may not be the case. See also Billy R. Close & Patrick L. Mason, *Searching for Efficient Enforcement: Officer Characteristics and Racially Biased Policing*, 3 REV. L. & ECON. 263 (2007) (finding that the hit rates of black and Latino officers were higher than that of white officers).

124. See Max Minzner, *Putting Probability Back into Probable Cause*, 87 TEX. L. REV. 913, 914 (2009).

125. *Id.* at 914–15.

suspect than are others. They also differ in their fine-tuned abilities to almost instantaneously decide the right moment to pull or hold the trigger when faced with unexpected, dangerous, rapidly unfolding situations.¹²⁶

In sum, the current operation of the reasonable suspicion standard does not account for differences in an officer's ability to judge potentially criminal behavior. Instead, courts defer to officers' inferences based upon the unsupported assumption that experience, which remains undefined in the doctrine, automatically translates into expertise in interpreting the criminality of ambiguous behavior. This assumption does not withstand empirical scrutiny.

Does the reasonable suspicion standard have the potential to be simultaneously more efficient and more protective of individual liberty? Are its current shortcomings the result of a doctrinal failure to be realistic about the nature of suspicion and the ability of officers to make accurate judgments of criminality? Part III considers these questions by proposing and evaluating a new approach.

III. NEW CONCEPTUAL FRAMEWORK

When determining whether officers had the reasonable suspicion necessary to justify a stop and frisk, courts currently assume that the presence or absence of reasonable suspicion can be determined objectively simply by examining the factual circumstances that the officers confronted. The current inquiry is fact intensive.

Take the Ninth Circuit's approach in *United States v. Sokolow*¹²⁷ as an example. In that case, the officer provided the following facts as the basis for his suspicion:

(1) that Sokolow had just returned from a three-day trip to Miami, a well-known source city for drugs; (2) that Sokolow had paid for his tickets out of a large wad of \$20 bills; (3) that neither Sokolow nor Norian checked any luggage; (4) that during Sokolow's layover in Los Angeles he "appeared to be very nervous and was looking all around the waiting area"; (5) that Sokolow dressed in a black jumpsuit and wore a lot of gold jewelry; and (6) that Sokolow had his voice on an answering machine at a phone subscribed to by Karl Herman but was ticketed under the name Andrew Kray.¹²⁸

126. Silverman, *supra* note 87, at 140. See also Albert W. Alschuler, *Upside and Downside of Police Hunches and Expertise*, 4 J.L. ECON. & POL'Y 115, 117-18 (2007) (describing the process of chicken sexing where experienced individuals can differentiate between male and female recently hatched chicks, yet they cannot articulate exactly how they are able to differentiate); James M. Rosenbaum, *Hunches: Too Much Discretion, Not Enough Control*, 4 J.L. ECON. & POL'Y 107, 107-08 (2007) (relating the story of an officer on a ride along with an experienced DUI officer who could determine whether or not someone was drunk to a high level of accuracy even when the individual did not appear drunk to others).

127. 831 F.2d 1413 (9th Cir. 1987), *rev'd on other grounds*, 490 U.S. 1 (1988).

128. *Id.* at 1417.

To determine whether the officer's suspicion was reasonable, the Ninth Circuit divided the facts into "evidence of 'ongoing criminal behavior,' on the one hand, and 'probabilistic' evidence, on the other" ¹²⁹ After analyzing the facts in this manner, the Ninth Circuit concluded that the officer's suspicion was unreasonable. ¹³⁰

The Supreme Court rejected this approach, criticizing it as too formalistic because it involved "draw[ing] a sharp line between types of evidence, the probative value of which varies only in degree." ¹³¹ The Court acknowledged that the facts were open to different, yet equally plausible, interpretations. As a result, the facts did not have "the sort of ironclad significance attributed to them by the Court of Appeals." ¹³² However, rather than building from its premise that antithetical inferences can be made from identical facts ¹³³ and rethinking the reasonable suspicion inquiry based upon this observation, the Court instead proceeded to conduct its own analysis of the facts and concluded that they did give rise to a reasonable inference of criminality. ¹³⁴

Yet, it is unclear how the Court reached this conclusion. If the conclusion was based upon the Court's own analysis of the facts, it is not obvious why the Court's analysis is any more accurate than the analysis conducted by the Ninth Circuit. If the conclusion was based upon the officer's reliance on these facts, there was no evidence presented that the officer had any skill in connecting these facts with criminality. The officer's stop could have been based on a lucky hunch. Simply stating the factual basis of his stop did not give the Court any information upon which to judge whether the officer's suspicions were reasonable. Rather, the reasonableness of the officer's conclusion seems based upon the fact that evidence of guilt was subsequently found on the target. This method of analysis fails to prevent hunch-based policing and does little to provide meaningful review of police decision making.

Relying upon powerful new behavioral sciences research, this Article rejects the premise that suspicion is objectively determinable. Suspicion is not something that either is or is not objectively provoked by a given set of facts. Rather, whether identical behaviors are interpreted as suspicious can be influenced by the operation of implicit social cognitions.

My goal in the following two subparts is to think about whether Fourth Amendment doctrine can effectively address this new insight about the nature of suspicion. I consider whether it would be beneficial and feasible to shift the primary focus of the reasonable suspicion analysis from a review of the facts giving

129. *United States v. Sokolow*, 490 U.S. 1, 8 (1988).

130. *Sokolow*, 831 F.2d at 1423–24.

131. *Sokolow*, 490 U.S. at 8.

132. *Id.*

133. For another example of antithetical inferences, see *United States v. Erwin*, a case in which the reasonable suspicion determination turned on the court's interpretation of the defendant's movements in an airport. 803 F.2d 1505, 1511, 1512 (9th Cir. 1986). The majority interpreted the defendant's movements as evasive, while the dissent attributed the defendant's circuitous route in the airport to his desire to avoid a picket line. *Id.* The evidence supported both interpretations. *Id.*

134. *Sokolow*, 490 U.S. at 8–11.

rise to the suspicion to a focus on how proficient the officer conducting the *Terry* stop is at inferring criminality. This new officer-centric approach would require courts to take into account an officer's hit rate—the rate at which the officer has successfully detected criminal activity when conducting stops and frisks in the past.¹³⁵ In addition, I analyze whether courts should strengthen the articulation requirement by mandating that officers state how their experience and training enhanced their ability to judge the criminality of the facts they observed on the occasion at issue. Under this new officer-centric approach, the court's attention would be on officer proficiency rather than on solely attempting to analyze whether the facts support a suspicion that is reasonable.

A. Officer Hit Rates

Courts currently pay scant attention to officer competence, despite references to it. For instance, in *United States v. Arvizu*,¹³⁶ an officer stopped a driver he suspected of smuggling illegal aliens. In upholding the *Terry* stop, the Court found that it was “quite reasonable that a driver's slowing down, stiffening of posture, and failure to acknowledge a sighted law enforcement officer might well be unremarkable in one instance (such as a busy San Francisco highway) while quite unusual in another (such as a remote portion of rural southeastern Arizona).”¹³⁷ In concluding that the officer's suspicion was reasonable, the Court maintained that the officer “was entitled to make an assessment of the situation in light of his specialized training and familiarity with the customs of the area's inhabitants.”¹³⁸

The Court was on the right track when it focused upon officer competence. An officer's training and knowledge may well affect the reasonableness of his inferences. However, without evidence of how proficient the officer is at making these judgments, a court cannot meaningfully judge the weight to accord the officer's assessment.

At present, as long as officers articulate some objective facts justifying their suspicions, courts typically defer to their judgments. While some deference in appropriate circumstances may be justifiable from the perspective of institutional competence, courts rarely require information concerning an officer's ability to make these judgments accurately. Such information is important since suspicion is not objectively determinable in the face of ambiguous facts. Rather, the interpretation of ambiguous facts as suspicious is often dependent upon the race of the individual observed and the officer's nonconscious racial biases;¹³⁹ and officers differ in their abilities to make accurate judgments. Obtaining information about an officer's hit rate would provide courts with some information about the officer's abilities.¹⁴⁰ Under this proposal, then, hit rates would be one factor, albeit an important one, in the totality of the circumstances analysis.¹⁴¹

135. For an excellent discussion advocating the use of hit rates to increase the accuracy of probable cause determinations, see Minzner, *supra* note 124.

136. 534 U.S. 266 (2002).

137. *Id.* at 275–76.

138. *Id.* at 276.

139. See *supra* Part I.

140. I am not the first to argue for the use of hit rates in the Fourth Amendment context.

This proposal leaves a number of questions unanswered concerning hit rates. First, what should constitute a hit? Surely consensual and noninvestigatory contacts should not. However, at what point does an encounter become investigatory? Second, what is the hit rate that courts should consider reasonable? Should there be a static hit rate that is appropriate for all types of stops? Or, should courts determine the appropriate hit rate on a case-by-case basis? For instance, perhaps the reasonableness of the officer's hit rate should depend upon the scope of the intrusion and the gravity of the suspected offense.¹⁴²

While these questions are not answered here, consideration of officers' hit rates would have a number of important benefits. For one, it would begin moving the *Terry* doctrine beyond the current fiction that the reasonableness of suspicion can be determined objectively simply by reviewing the facts and circumstances the officer observed. Furthermore, hit rates would require a court to confront officer competence explicitly. If an officer has a low hit rate, courts would have to provide an explanation for why they found his suspicion reasonable despite the low rate, lending some transparency and accountability to their decisions. Additionally, the proposal will educate courts about the fallibility of the police in a systematic way. Presently, courts likely assume that officers are good at making judgments of criminality because they rarely, if ever, obtain information about the cases in which officers are incorrect. Through consistent exposure to individual officer hit rates, courts will have a better sense of officer fallibility, perhaps leading to more realistic balancing of privacy and security in Fourth Amendment jurisprudence generally.

Requiring evidence of hit rates might also spark beneficial institutional changes. If hit rates become important, departments will have to create a system for collecting officer hit rate data. This will allow departments to track the effectiveness of officers engaged in proactive policing. Furthermore, this system will give departments the ability to assess the efficacy of their training programs because they will be able to track whether officer accuracy increases as a result. The department will obtain concrete information about the varying proficiencies of their officers and will have to determine what to do with officers whose hit rates are too low to pass constitutional muster. Once proficient officers are identified, the department can begin the process of trying to discover what makes those officers more effective than others and use this information to improve the performance of

In a recent article, Max Minzner argues that in appropriate circumstances, magistrates determining the existence of probable cause should consider an officer's success rates in the analysis. Minzner, *supra* note 124.

141. See *United States v. Sokolow*, 831 F.2d 1413, 1418 (9th Cir. 1987), *rev'd on other grounds*, 490 U.S. 1 (1988) ("In assessing whether a given set of facts constitutes reasonable suspicion, we must determine whether the facts collectively establish reasonable suspicion, not whether each particular fact establishes reasonable suspicion. '[T]he totality of the circumstances—the whole picture—must be taken into account.'" (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981)) (alteration in original)).

142. For discussions about the importance of proportionality to the Fourth Amendment, see generally Akhil Reed Amar, *Terry and Fourth Amendment First Principles*, 72 ST. JOHN'S L. REV. 1097, 1120–23 (1998) (discussing *Terry*'s proportionality principle); Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 47 (1991) (stating that "the level of intrusion associated with the police action is the most important gauge of how much certainty the police must have before they conduct a search or seizure").

the less effective officers. This might entail additional training, partnering less effective officers with those who are more proficient, or a host of other possibilities. The benefit of this approach is that courts, by making hit rates important, will create incentives for departments to increase officer effectiveness while allowing departments to retain the flexibility to determine how best to achieve this.

Furthermore, by gathering information about officer proficiency, institutions may learn to identify the type of person who is more likely to make accurate judgments of criminality. With this information, departments may be better able to recruit officers with those characteristics.¹⁴³

Identifying officers who are not adept at making judgments of criminality is important for a number of reasons. First, an officer who is not good at making judgments of criminality based upon ambiguous information will waste time and resources on unproductive stops and frisks, which is problematic in a time of scarce resources.

Second, an unproductive officer reduces law enforcement effectiveness by fostering community resentment and distrust. This officer will infringe upon the privacy and liberty of many innocent individuals. Of course, the Fourth Amendment does not require or demand certainty.¹⁴⁴ However, the discretion of officers who are more often wrong than correct should be limited because their actions are arbitrary. To the extent that this officer's unsuccessful searches are concentrated amongst members of a discrete racial group, the perception amongst the group may be that this particular officer is a "bad" officer—one who wrongfully and unfairly harasses individuals, even if the officer is acting in good faith. This does not serve law enforcement interests to the extent that this officer's behaviors cause resentment in the community. This resentment will likely lead to distrust of police in general and make individuals less willing to cooperate with law enforcement.¹⁴⁵

Knowledge of their hit rates may also encourage behavioral changes that have the potential to reduce the effects of implicit bias.¹⁴⁶ Implicit social cognition

143. See L. Song Richardson, *Cognitive Bias, Police Character, and the Fourth Amendment*, 44 ARIZ. ST. L.J. (forthcoming Spring 2012) (exploring the influence of officer character on judgments of suspicion).

144. See, e.g., *Illinois v. Caballes*, 543 U.S. 405, 413 (2005) (Souter, J. dissenting) ("[T]he Fourth Amendment does not demand certainty of success to justify a search for evidence or contraband.").

145. Jamie L. Flexon, Arthur J. Lurigio & Richard G. Greenleaf, *Exploring the Dimensions of Trust in the Police Among Chicago Juveniles*, 37 J. CRIM. JUST. 180, 180 (2009) (explaining that when citizens distrust the police they are hesitant to report crimes and to help with police investigations).

146. Numerous studies demonstrate that implicit biases are malleable. See, e.g., Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 PERSONALITY & SOC. PSYCHOL. REV. 242 (2002) (reviewing literature testing whether automatic stereotypes are malleable). Neuroscientific studies also provide evidence of malleability. Patricia G. Devine & Lindsay B. Sharp, *Automaticity and Control in Stereotyping and Prejudice*, in HANDBOOK OF PREJUDICE, STEREOTYPING, AND DISCRIMINATION 76–80 (Todd D. Nelson ed., 2009) (citations omitted).

research demonstrates that while implicit biases are ubiquitous, they are also malleable.¹⁴⁷ It is possible to reduce their effects on behavior.¹⁴⁸

If their hit rates matter, officers will be motivated to be more accurate before conducting a *Terry* stop. This will likely translate into them gathering more unambiguous information of criminality than they currently obtain before conducting a stop. Thus, to the extent that a focus on hit rates changes officer incentives and motivates them to individuate, it has the potential to reduce the effects of implicit biases on officer behavior.¹⁴⁹

Studies demonstrate that gathering more individuating information about people can reduce the activation of nonconscious racial stereotypes.¹⁵⁰ For instance, in a

147. Blair, *supra* note 146 (reviewing literature testing whether automatic stereotypes are malleable); Irene V. Blair, Jennifer E. Ma & Alison P. Lenton, *Imagining Stereotypes Away: The Moderation of Implicit Stereotypes Through Mental Imagery*, 81 J. PERSONALITY & SOC. PSYCHOL. 828 (2001) (discussing mental imagery studies which demonstrate that stereotypes are malleable); John T. Jost, Laurie A. Rudman, Irene V. Blair, Dana R. Carney, Nilanjana Dasgupta, Jack Glaser & Curtis D. Hardin, *The Existence of Implicit Bias Is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies that No Manager Should Ignore*, 29 RES. ORGANIZATIONAL BEHAV. 39, 44–45 (2009); Ziva Kunda & Lisa Sinclair, *Motivated Reasoning with Stereotypes: Activation, Application, and Inhibition*, 10 PSYCHOL. INQUIRY 12, 18 (1999) (stating that “research provides suggestive but not indisputable evidence for the possibility that people may inhibit the activation of stereotypes in some circumstances”); Wheeler & Fiske, *supra* note 49 (demonstrating that amygdala activation to outgroup members is not inevitable). Evidence of malleability is also found in neuroscientific studies. Devine & Sharp, *supra* note 146, at 76–80. In fact, some studies demonstrate that some people who are low in prejudice may not activate racial stereotypes at all. Kunda & Sinclair, *Motivated Reasoning*, *supra*, at 15–16. One study demonstrated that exposure to positive examples of outgroup members could reduce implicit biases. Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCHOL. 800 (2001). *But see* Jennifer A. Joy-Gaba & Brian A. Nosek, *The Surprisingly Limited Malleability of Implicit Racial Evaluations*, 41 SOC. PSYCHOL. 137, 144–145 (2010) (while malleability was shown after exposure to counter-stereotypical racial group members, the effects were weak).

148. For a discussion of the malleability of implicit social cognitions, see Richardson, *supra* note 3, at 2054–55.

149. For studies discussing the importance of motivation to reducing implicit biases, see Patricia G. Devine, E. Ashby Plant, David M. Amodio, Eddie Harmon-Jones & Stephanie L. Vance, *The Regulation of Explicit and Implicit Race Bias: The Role of Motivations To Respond Without Prejudice*, 82 J. PERSONALITY & SOC. PSYCHOL. 835, 845 (2002) (showing that people with high internal motivation to be nonprejudiced more effectively controlled racial bias); Jack Glaser & Eric D. Knowles, *Implicit Motivation To Control Prejudice*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 164, 171 (2008); Wheeler & Fiske, *supra* note 49.

150. C. Neil Macrae, Galen V. Bodenhausen, Alan B. Milne, Tania M. J. Thorn & Luigi Castelli, *On the Activation of Social Stereotypes: The Moderating Role of Processing Objectives*, 33 J. EXPERIMENTAL SOC. PSYCHOL. 471 (1997); *see also* Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, in THE HANDBOOK OF SOCIAL PSYCHOLOGY 357 (Daniel T. Gilbert, Susan T. Fiske & Gardner Lindzey eds., 4th ed. 1998) (reviewing studies documenting that individuation reduces automatic stereotyping); Susan T. Fiske, *Intent and*

study testing “shooter bias,”¹⁵¹ researchers found that both civilians and police officers more quickly shot an unarmed black individual than an unarmed white as a result of implicit bias.¹⁵² Intriguingly and unexpectedly, however, officers performed better than civilians did. Officers were better able to overcome the effects of implicit bias on their shoot/don’t-shoot decisions, leading researchers to tentatively conclude that their training to be careful before shooting “may allow officers to more effectively exert executive control . . . essentially overriding response tendencies that stem from racial stereotypes.”¹⁵³

Furthermore, as individuation becomes habitual, it can alter and even eliminate automatic, nonconscious reactions.¹⁵⁴ This can occur because the relationship between the conscious mind and nonconscious mind is “bi-directional—each level of mind reciprocally influence[s] the other. . . . This observation means that the conscious [mind] can, especially over time, gain a measure of control over the subconscious, though the latter necessarily continues to influence the former.”¹⁵⁵ Thus, consciously considering more data can alter nonconscious and automatic reactions to certain stimuli such as race.

Gathering hit rates will also provide useful information to individual officers. Officers likely believe they are more proficient at judging criminality than is actually the case.¹⁵⁶ This occurs because stereotypes about criminality can affect what events are encoded into memory.¹⁵⁷ People often have better memories for events that are consistent with their pre-existing expectations rather than for those that are not.¹⁵⁸

Ordinary Bias: Unintended Thought and Social Motivation Create Casual Prejudice, 17 SOC. JUST. RES. 117, 123–24 (2004) (discussing individuation); Margo J. Monteith, Jeffrey W. Sherman & Patricia G. Devine, *Suppression as a Stereotype Control Strategy*, 2 PERSONALITY & SOC. PSYCHOL. REV. 63, 72 (1998) (discussing individuation and citing studies that demonstrate that “[o]ne factor that strongly influences the likelihood of individuation is the perceiver’s degree of motivation to form accurate, nonstereotypical impressions”).

151. See *supra* notes 35–38 and accompanying text for a discussion of shooter bias.

152. Correll et al., *Thin Blue Line*, *supra* note 38.

153. *Id.*

154. Andrew E. Taslitz, *Forgetting Freud: The Courts’ Fear of the Subconscious in Date Rape (and Other) Cases*, 16 B.U. PUB. INT. L.J. 145, 177 (2007) (noting that “[t]he subconscious mind also monitors, and learns from, our own behavior. . . . Your behavior provides new data for the subconscious, and any behavior repeated often enough to become habitual will also become part of the subconscious.”).

155. *Id.* at 174 (citation omitted).

156. Professor Craig Lerner writes, “[a]mong themselves and in informal discussions with others, police officers insist that their hunches about criminals are often right and that their ‘sixth sense’ proves invaluable in the field.” Lerner, *Reasonable Suspicion and Mere Hunches*, *supra* note 88, at 413.

157. Myron Rothbart, Mark Evans & Solomon Fulero, *Recall for Confirming Events: Memory Processes and the Maintenance of Social Stereotypes*, 15 J. EXPERIMENTAL SOC. PSYCHOL. 343, 344 (1979); see also Claudia E. Cohen, *Person Categories and Social Perception: Testing Some Boundaries of the Processing Effects of Prior Knowledge*, 40 J. PERSONALITY & SOC. PSYCHOL. 441 (1981) (describing study in which subjects were more likely to remember stereotype consistent information).

158. Charles M. Judd & Bernadette Park, *Definition and Assessment of Accuracy in Social Stereotypes*, 100 PSYCHOL. REV. 109, 112 (1993).

For instance, in one study involving police officers, researchers found that an officer's implicit racial stereotypes of criminality caused them to pay more attention to black faces than to white faces.¹⁵⁹ However, this increased attention did not improve their memories for the black faces they viewed. Rather, officers were more likely to falsely identify a black face as one they had viewed previously when that face had more stereotypically black features.¹⁶⁰ Officers did not make the same mistake with white faces.¹⁶¹ The researchers concluded that "though stereotypic associations led perceivers to look in a particular location, . . . what perceivers were able to remember was, in part, a function of these stereotypic associations."¹⁶² Thus, because of implicit bias, officers may be more likely to remember situations in which their suspicions of criminality were confirmed than when they were not. In fact, counterintuitively, their failed searches may actually solidify their racial stereotypes as officers think to themselves, "Well, he's guilty, he just got away with it this time."¹⁶³

Since officers will be required to collect their hit rates, they may learn that their beliefs about how proficient they are at judging criminality are incorrect. Their low hit rates may cause concern and surprise, especially for those officers who are acting in good faith and doing their best to stop only those individuals they believe are engaged in criminal activity. Additionally, for officers engaged in proactive policing in urban, majority-black areas, their hit rates may cause them to question their conscious stereotypes of the relationship between race and crime. At this point, some officers will be motivated to understand their low hit rates.¹⁶⁴ They may even be more open to information concerning implicit biases. For officers with high hit rates, they may be able to identify the factors that enable them to achieve more accuracy in conducting stops and frisks. This information will help police departments educate and train all officers more effectively.

Because courts will require information in order to contextualize the hit rate, this proposal retains the articulation requirement. However, its current conception is anemic. Subpart B discusses the second component of this proposal—a meatier articulation requirement.

B. Robust Articulation Requirement

Currently, the articulation mandate only requires officers to state the factual bases for their stops so that courts can determine whether they give rise to a reasonable suspicion.¹⁶⁵ The *Terry* Court assumed that requiring articulation of the

159. Eberhardt et al., *supra* note 21, at 887.

160. *Id.*

161. *Id.* at 888.

162. *Id.* at 887–88.

163. This can happen through "subtyping." KUNDA, *supra* note 10, at 384. "By allocating counterstereotypic individuals . . . to a subtype that is considered atypical and unrepresentative of the group as a whole, one may be able to maintain one's global stereotype of the group even though one knows that some group members do not fit the bill." *Id.*

164. See *infra* Part III.C.4 for studies demonstrating the relationship between motivation and reduction of implicit biases' effects on behavior.

165. See *infra* Part III.C.1 for a discussion of the problems with the current articulation

facts that led officers to feel suspicious would prevent them from acting on mere hunches. However, this purpose for the articulation requirement is essentially meaningless since the reasonableness of an officer's suspicion cannot be determined simply through a review of the facts leading to the stop.¹⁶⁶

Additionally, the Court's focus on articulation has created an unintended consequence. As put by Judge Kozinski, rather than protecting individuals against arbitrary policing, the requirement simply "creates an incentive for officers to exaggerate or invent factors, just to make sure that the judges who review the case will approve their balancing act."¹⁶⁷ This occurs because courts tend to uphold *Terry* stops as long as officers avoid using certain buzzwords related to hunches such as "intuition" and "instinct." Hence, police officers "load[] up their testimony with as many acceptable 'objective' pieces of evidence as possible," as Professor Craig Lerner found when he examined lower court motions to suppress in *Terry* cases.¹⁶⁸ He continues,

[t]he judicial insistence that only 'objective' criteria can form the basis for a *Terry* stop in practice simply rewards those officers who are able and willing to spin their behavior in a way that satisfies judges. It rewards articulate officers and penalizes those who are less verbally facile or who are transparent about their motivations.¹⁶⁹

In fact, the articulation requirement has even influenced police training practices. For instance, the statement of objectives for a Justice Department training program utilized by a large number of state and local police departments relates that it is training officers on "how to articulate objective reasons for escalating stops and searches rather than attributing their actions to mere intuition or preconceptions."¹⁷⁰

Despite these problems, retaining the articulation requirement may be important for other reasons. To quote *Terry*, the requirement of providing hit rates should not "be taken as indicating approval of police conduct outside the legitimate investigative sphere. . . . [C]ourts still retain their traditional responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires."¹⁷¹ Thus, courts must continue to review the factual basis for the stop, even when an officer has a high hit rate, to ensure that the officer did in fact observe the behaviors that led him to feel suspicious. Without a requirement of articulation, there would be no basis for judging the officer's credibility. Thus,

requirement.

166. See *supra* Part II.A.

167. *United States v. Montero-Camargo*, 208 F.3d 1122, 1142 (9th Cir. 2000) (Kozinski, J., concurring). Federal court Judge Harold Baer also notes that it is easy for officers "to conform their testimony to the gossamer-like requirements" of reasonable suspicion. The Honorable Harold Baer, Jr., *Got a Bad Feeling? Is That Enough? The Irrationality of Police Hunches*, 4 J.L. ECON. & POL'Y 91, 103 (2007).

168. Lerner, *Reasonable Suspicion and Mere Hunches*, *supra* note 88, at 441.

169. *Id.* at 456–57.

170. Silverman, *supra* note 87, at 147–48 (citations omitted).

171. *Terry v. Ohio*, 392 U.S. 1, 15 (1968).

articulating the factual bases underlying a stop serves accountability and transparency goals.¹⁷²

Furthermore, articulation provides courts with the opportunity to determine whether the stop was based upon inappropriate criteria.¹⁷³ For instance, the Supreme Court has determined that consideration of race alone is never an adequate basis for a *Terry* stop.¹⁷⁴ This should continue to be the case regardless of how high the officer's hit rate is.

The question I would like to consider next is whether the current articulation requirement goes far enough. In addition to articulating the individualized facts that formed the basis for the officer's suspicion, perhaps an effective articulation requirement would also require officers to explain how the facts that led to the stop relate to their experience and training.

Others have argued that a strong connection between suspicion and the officer's training and experience might be critical to legitimizing an officer's actions.¹⁷⁵ For instance, Professor Eric Miller argues that without this link, officers could be "policing based on luck."¹⁷⁶ This would not only be "unconstitutional" but would also "undemocratically require[] randomly selected groups of citizens to sacrifice their security to satisfy the self-interested law enforcement aims of the

172. Taslitz, *supra* note 101, at 12; *see also* Albert W. Alschuler, *supra* note 126 (offering "five arguments in support of the requirement of specific and articulable facts"); Taslitz, *supra* note 101, at 61–67 (discussing the importance of the articulation requirement).

173. *See, e.g.*, Margaret Raymond, *Down on the Corner, Out in the Street: Considering the Character of the Neighborhood in Evaluating Reasonable Suspicion*, 60 OHIO ST. L.J. 99 (1999) (arguing that the character of the neighborhood should not be considered in determining whether a reasonable suspicion exists except in limited circumstances).

174. *See, e.g.*, *United States v. Martinez-Fuerte*, 428 U.S. 543, 563 (1976) (ancestry is a relevant factor but not standing alone); *United States v. Brignoni-Ponce*, 422 U.S. 873, 885–87 (1975) (same). *But see* *United States v. Montero-Camargo*, 208 F.3d 1122, 1135 (9th Cir. 2000) (en banc) ("Hispanic appearance is, in general, of such little probative value that it may not be considered as a relevant factor where particularized or individualized suspicion is required. Moreover, we conclude, for the reasons we have indicated, that it is also not an appropriate factor.").

175. As Margaret Raymond has argued, articulation "not only exposes the basis for police conduct to judicial oversight, but the articulation of precisely what was observed and how it had meaning in the context of the officer's experience has educative value. Only then can we begin to bridge that gap between police perception and community perception of who should be stopped and why." Margaret Raymond, *Police Policing Police: Some Doubts*, 72 ST. JOHN'S L. REV. 1255, 1264 (1998); *see also* Alschuler, *supra* note 126, at 123–24 ("[D]eferred to an officer's unproven expertise has much in common with deferring to his hunches. Both practices frustrate the independent review of searches and seizures that the Fourth Amendment demands.").

176. Eric J. Miller, *The Epistemology of Suspicion* (unpublished manuscript) (on file with author) ("In opposition to the dominant paradigm, I shall claim that suspicion, as an epistemically rational mental state, connotes a particular attitude on the part of an investigator towards the available evidence. . . . [A]ny account of rational suspicion requires some qualitative explanation, one that includes the agent's understanding of how the available evidence hangs together. . . . The point is not simply to try to obtain some antecedent understanding of the probabilities facing a given officer, but to determine how skilled is the officer given her training and experience." (footnote omitted)).

government.”¹⁷⁷ Similarly, Professor Andrew Taslitz has argued that articulation can protect against the police

catching the guilty by pure luck rather than by the reasoned, individualized decision-making process that the Constitution commands

. . . . We must catch the bad guys, . . . *only* when we have ample justification, rooted in reasonably solid evidence, that a particular person’s wrongdoing has occurred or that evidence of it will be found.¹⁷⁸

Consideration of an officer’s hit rate alone may not prevent luck-based policing. For instance, let us assume for a moment that Officer McFadden, the officer involved in the *Terry* case, has a high hit rate. Let us also assume he testifies that he has no experience with and has received no training concerning how people casing joints for daytime robberies might act.¹⁷⁹ A court considering his hit rate alone might find that it is reasonable to defer to his inference that Terry’s ambiguous conduct evidenced criminality. However, his lack of training or experience with this particular type of crime might mean that his stop and frisk, and subsequent discovery of criminal activity, were based purely upon luck. As a result, it may be unreasonable for a court to defer to McFadden’s inferences of criminality, despite his high hit rate. Thus, mandating inquiry into an officer’s training and experience and how they relate to his suspicions on a particular occasion might be necessary to prevent luck-based policing. For example, if McFadden had a high hit rate, had received training about the behaviors that are typically exhibited by individuals about to conduct a daytime robbery, and testified that the behaviors he observed were consistent with his training, a court could determine that his stop and frisk and subsequent discovery of a gun were not the result of luck, but of skill.

A more robust articulation requirement may also lead to beneficial institutional changes. Currently, there is no uniform training of officers.¹⁸⁰ A doctrinal requirement that makes training an important consideration will create incentives for departments to be more systematic in ensuring that officers engaged in proactive policing receive it. Additionally, requiring an officer to disclose how long he has been an officer is important to contextualize the hit rate. For instance, a rookie officer may have a 100% hit rate if he has only conducted one stop that resulted in evidence of contraband. Another officer with only two stops, only one of which was successful, would have a 50% hit rate. Hence, courts will require

177. *Id.*

178. Taslitz, *supra* note 101, at 9–10 (emphasis in original) (footnotes omitted); *see also id.* at 52.

179. *See supra* note 98 and accompanying text.

180. *See generally* Eric J. Miller, *Putting the Practice into Theory*, 7 OHIO ST. J. CRIM. L. 31 (2009) (noting the lack of uniform training standards for police). *See also* Editorial, *The Truth Behind Stop and Frisk: A Court Needs To Take a Very Hard Look at the Police Tactic*, N.Y. TIMES, Sep. 3, 2011, at A20 (noting that NYPD officers did not recall receiving training that covered proper arrest procedures and warnings to avoid racial profiling).

additional information beyond the hit rate in order to evaluate how much weight it should be afforded.

In sum, the two prongs of the proposal complement each other. Without articulation, courts would have no ability to judge the officer's credibility or to determine whether the officer was relying upon criteria that should never justify a reasonable suspicion. And without the hit rate, courts cannot determine how skilled an officer is at making judgments of criminality, despite his training and experience. The fact that an officer has received training, even specialized training, is no guarantee of proficiency. Neither is the length of an individual's experience as an officer necessarily probative. Both requirements are necessary to give courts the tools to differentiate between luck on the one hand and proficiency on the other.¹⁸¹ An inquiry into an officer's hit rates, coupled with a more robust articulation requirement, will aid courts in making the determination of when an officer's inferences are entitled to weight, and if so, how much. Furthermore, once articulation is only one component, but not the dispositive component, in determining whether a reasonable suspicion exists, officers will likely exercise more care in determining whether or not to conduct a *Terry* stop, rather than on devising ways to conform their testimony to existing doctrinal requirements.¹⁸² Both requirements will help reduce unjustifiable and arbitrary encroachments on individual liberty and privacy.¹⁸³

In thinking through the benefits of this proposal, it might be useful to think of an analogy to a situation with which most of us are familiar—a law school. The simple fact that John Smith completed a class in criminal procedure tells us only that he received training but conveys no information about his understanding (proficiency). We test his proficiency by asking him to apply his knowledge (training) in an exam. His success on the exam then serves as a proxy for his proficiency. Similarly, the fact that John Smith is a third-year law student (experience) also may tell us very little about abilities and competence. Rather, we would want some information about his past performance in order to make an educated judgment about his future performance. In the law school context, then, we believe that one's success rate, most often measured by one's GPA, serves as a useful though perhaps

181. See Miller, *supra* note 176, for a discussion of the importance of linking skill to suspicion in order to prevent policing based upon luck.

182. For a general discussion of the importance of individualized suspicion in the Fourth Amendment context, see Andrew E. Taslitz, *What Is Probable Cause, and Why Should We Care?: The Costs, Benefits, and Meaning of Individualized Suspicion*, 73 LAW & CONTEMP. PROBS. 145 (2010). Another safeguard against post-hoc rationalizations may be to have officers record their explanations for the stop and frisk before approaching the target, when time allows. This could be done through a recording device attached to their uniforms.

183. In a recent article, Professor Tonja Jacobi argues that Fourth Amendment doctrine should “embrace rules that aid screening between innocent and guilty defendants and forego rules that blur those categories.” Tonja Jacobi, *The Law and Economics of the Exclusionary Rule*, 87 NOTRE DAME L. REV. 585, 660 (2011). In her view, if the purpose of the Amendment is to “protect the guilty so as not to intrude on the innocent, rather than the reverse, then the more accurate and powerful a screening device is, the more reasonable it is.” *Id.* at 667. Consideration of an officer's hit rates in the reasonable suspicion analysis would be one way to protect the innocent more effectively.

blunt proxy for ability. Finally, even if an individual obtains a high grade on an exam, without some evidence of his actual knowledge (training) and his years in law school (experience), we would not be able to determine whether the result was based upon pure luck. In other words, in law school, we want to consider all this information. Considering an officer's hit rates and requiring a more robust articulation can serve the same purposes.

Recently, the Florida Supreme Court adopted an approach very similar to the one proposed in this Article that combines hit rates with a more robust articulation requirement. This occurred in a case involving canine sniffs for the presence of narcotics.¹⁸⁴ By way of background, in *United States v. Place*, the Supreme Court held that canine sniffs were not searches because drug-detection dogs only respond to the presence of illegal substances for which there is no reasonable expectation of privacy.¹⁸⁵ Over twenty years later, Justice Souter rejected the conclusion that dog sniffs were not searches, basing his argument on evidence that these dogs were fallible.¹⁸⁶ In his view, this crumbled the foundation on which *Place* rested.¹⁸⁷

Building from this premise, the Florida Supreme Court considered the question of what evidence was necessary for a trial court to meaningfully determine whether a drug detection dog is "well-trained," such that its alert suffices to establish probable cause to conduct a search for drugs.¹⁸⁸ The court rejected the premise that drug dogs were reliable based solely on the fact that they were trained and certified. Rather, in order for a court to "adequately undertake an objective evaluation of the officer's belief in the dog's reliability as a predicate for determining probable cause,"¹⁸⁹ the court held that the government

must present the training and certification records, an explanation of the meaning of the particular training and certification of that dog, field performance records, and evidence concerning the experience and training of the officer handling the dog, as well as any other objective evidence known to the officer about the dog's reliability in being able to detect the presence of illegal substances within the vehicle.¹⁹⁰

Furthermore, the Court required the government to

explain the training and certification so that the trial court can evaluate how well the dog is trained and whether the dog falsely alerts in training (and, if so, the percentage of false alerts). Further, the State

184. *Harris v. State*, No. SC08-1871, 2011 Fla. LEXIS 953 (Fla. Apr. 21, 2011).

185. *Illinois v. Caballes*, 543 U.S. 405, 409 (2005) ("[T]he use of a well-trained narcotics-detection dog—one that 'does not expose noncontraband items that otherwise would remain hidden from public view,'—during a lawful traffic stop generally does not implicate legitimate privacy interests." (quoting *United States v. Place*, 462 U.S. 696, 707 (1983))).

186. *Caballes*, 543 U.S. at 411–13 (Souter, J. dissenting).

187. *See id.* For a full discussion critiquing the Court's approach to drug-sniffing dogs, see Andrew E. Taslitz, *Does the Cold Nose Know? The Unscientific Myth of the Dog Scent Lineup*, 42 HASTINGS L.J. 17(1990).

188. *Harris*, 2011 Fla. LEXIS 953, at *25.

189. *Id.* at *2–3.

190. *Id.* at *4.

should keep and present records of the dog's performance in the field, including the dog's successes (alerts where contraband that the dog was trained to detect was found) and failures ("unverified" alerts where no contraband that the dog was trained to detect was found). The State then has the opportunity to present evidence explaining the significance of any unverified alerts. . . . Under a totality of the circumstances analysis, the court can then consider all of the presented evidence and evaluate the dog's reliability.¹⁹¹

The Florida Supreme Court's decision occurred in the probable cause context and was based, in part, on the fact that a dog could not be cross-examined. However, the same reliability concerns exist in situations involving reasonable suspicion judgments. Furthermore, although officers can be cross-examined, the fact that nonconscious biases can affect the reliability of their judgments of suspicion limits the usefulness of cross-examination. An officer will not be aware of the effects of nonconscious biases on his behavior.

Concrete proposals for the implementation of this proposal are beyond the scope of this Article. Rather, the point is to highlight the need to think seriously about how to address the fact that suspicion is not the objective concept the *Terry* doctrine assumed that it was.¹⁹² What follows are some initial thoughts that can guide implementation, but further development must await future consideration.

For a starting point, the complete failure to provide hit rate data, absent a compelling explanation, should result in suppression of the evidence. On the other hand, a high hit rate alone should be an insufficient basis for a finding a stop and frisk reasonable because, as discussed above, a high hit rate does not preclude luck. Hence, courts should require additional information beyond the hit rate in order to evaluate how much weight it should be afforded. My proposal would mandate inquiry into an officer's training and experience and how they relate to his suspicions on a particular occasion.

191. *Id.* at *42; *see also* *State v. England*, 19 S.W.3d 762, 768 (Tenn. 2000) (noting that probable cause should not be based solely upon a canine's positive alert but also upon proof of the dog's reliability).

192. One intriguing suggestion is to replace *Terry* stops with random stops of groups of citizens. In a recent article, Professors Harcourt and Meares argue that the obsession with individualized suspicion in Fourth Amendment jurisprudence should be abandoned. Replacing it would be "a new paradigm of randomized encounters that satisfy a base level of suspicion in order to capture the benefits of *both* privacy-protection (by ensuring a minimum level of suspicion) *and* evenhandedness (by cabining police discretion)." Bernard E. Harcourt & Tracey L. Meares, *Randomization and the Fourth Amendment* 4 (John M. Olin Law & Econ., Working Paper No. 530 and Pub. Law & Legal Theory, Working Paper No. 317, 2010) (emphasis in original), *available at* <http://www.ssrn.com/abstract=1665562>; *see also* William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2163–69 (2002) (arguing that seizures of groups, "classes of people defined by place and time," would better protect Fourth Amendment values than the current individualized suspicion analysis).

C. Concerns and Questions

As with any novel approach, the proposal is not perfect. This subpart addresses some important concerns and raises some questions for future consideration.

1. Data Manipulation

The most obvious problem is that officers might manipulate their hit rates by failing to report their unproductive stops. While this concern is not fatal since officers who are motivated to fabricate can already do so under the current *Terry* framework, it must be addressed.

Institutional changes may alleviate some data fabrication concerns. First, departments could require officers to wear video recording devices while on duty in order to reduce prevarication.¹⁹³ Although this would require video storage, current technologies make this a viable option. Additionally, some cities have installed video surveillance cameras in neighborhoods that are high in crime.¹⁹⁴ Departments could periodically and randomly review selected videos and compare the findings to the hit rates reported by the officer in order to deter manipulation. Second, police chiefs and supervisors may be able to significantly reduce incentives for lying through the manner in which they frame the need to collect hit rates and by the policies and philosophies they institute in their departments.¹⁹⁵ In whatever way departments choose to deter the fudging of data, a zero-tolerance policy is likely crucial. Any officer who intentionally alters his hit rate data must be terminated. Finally, an example of the type of monitoring necessary to deter manipulation is already being used at the NYPD, where officers are required to record their stops and frisks on a special form.¹⁹⁶ In order to track officer compliance, the NYPD instituted an extensive monitoring system.¹⁹⁷ Other departments can create similar systems and learn from the experiences of the NYPD.

Another safeguard against data manipulation will be citizens, grassroots community groups, public defender offices, and nongovernmental organizations such as the American Civil Liberties Union (ACLU). Once these groups become aware that hit rates matter, it is likely that some systematic means of gathering data from citizens about the stops and frisks they witness or experience will be created. This database can serve as another source of information about an officer's hit rates. If there is a discrepancy between the officer's reported hit rate and the data

193. For a discussion of the use of body-worn video devices and their cost-effectiveness, see David A. Harris, *Picture This: Body-Worn Video Devices (Head Cams) as Tools for Ensuring Fourth Amendment Compliance by Police*, 43 TEX. TECH. L. REV. 357 (2010).

194. See, e.g., CHICAGO POLICE DEP'T, CRIME SURVEILLANCE INNOVATIONS IN CHICAGO: THE HISTORY OF POLICE OBSERVATION DEVICES (2008), available at <https://portal.chicagopolice.org/portal/page/portal/ClearPath/About%20CPD/POD%20Program/POD-History.pdf>.

195. James J. Fyfe, *Terry: A[n Ex-]Cop's View*, 72 ST. JOHN'S L. REV. 1231, 1247 (1998) (citing numerous research studies which conclude that "the major determinant of officer's behavior in the streets is the philosophy and policy of their chiefs").

196. Gelman et al., *NYPD Analysis*, *supra* note 6, at 815.

197. *Id.* at 822.

collected by other means, this will serve as a red flag that more inquiry into the officer's hit rate is necessary. Again, if an investigation reveals dishonesty, the officer must be fired.

2. Overdeterrence

It is possible that the proposal will result in overdeterrence as officers refrain from conducting *Terry* stops for fear of negatively affecting their hit rates. However, we should be cautious before making this assumption. Officers are professionals who have incentives to maximize their searches and hit rates. Thus, rather than refraining, they may instead obtain training to increase their skill in making stops and frisks. In other words, they may continue to make stops, but engage in training to increase their hit rates.

To the extent that officers do reduce the number of stops and frisks they conduct, some caution on their part may be desirable given that many are already engaging in unproductive stops.¹⁹⁸ Furthermore, while we have become accustomed to the broad discretion police officers now enjoy because of the current operation of the *Terry* doctrine, it is worth remembering that, as Fourth Amendment historian Thomas Davies concludes, "we now accord officers far more discretionary authority than the Framers ever intended or expected."¹⁹⁹ Depending upon one's perspective, the reduction in police discretion to conduct *Terry* stops that may result from this proposal is not problematic.

3. Perverse Incentives and Unintended Consequences

While this proposal is likely to spur institutional changes, departments will have to carefully consider how they handle officers who have consistently low hit rates. One response to low hit rates may be to transfer the officer to a different location or to remove him from proactive policing duties altogether. This raises the risk that officers may purposely lower their hit rates in order to orchestrate a move to a different neighborhood or department they find more desirable.

Another problem is that focusing on hit rates may lead officers to concentrate their stops and frisks on certain communities of people based upon a belief that doing so will be more productive. As Professor Alschuler notes,

Suppose . . . that an officer has reason to believe that stopping one hundred blacks will, on average, yield six arrests for drug offenses while stopping one hundred whites will yield only five. If race were this officer's only predictor of illegal drug activity and if the officer had an unlimited number of blacks and whites to stop, she could maximize the number [of] drug arrests by stopping only blacks. . . .

The economics of proactive policing often encourage the police to "pile on." A small perceived disparity in the rate of offending of two groups can make it economically rational to concentrate enforcement

198. See *supra* notes 6–9 and accompanying text.

199. Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 556, 655–57 & n.299 (1999).

resources on the group whose investigation appears to yield the greater payoff in arrests and convictions. The result may be a “multiplier effect,” a “cop cascade,” or a “race to the black or brown race.” Police officials whose political incentives encourage them to denounce racial profiling may have economic incentives to do it. These incentives are independent of the racial biases that continue to infect American policing.²⁰⁰

It may well be the case that in an effort to increase their hit rates, officers will focus their attention on non-Whites or other groups believed to be more actively engaged in criminal activity. If doing so yields high hit rates, and officers are able to articulate the factual basis for their stops and how their training and experience relate to their suspicions, then there are limits to the ability of this proposal to address this situation. Of course, if proof exists of intentional race discrimination, the Fourteenth Amendment’s Equal Protection Clause would prohibit such conduct.²⁰¹ However, the Supreme Court has made it virtually impossible to prevail on an equal protection claim.²⁰² Also, officers who understand that race may be a prohibited factor in certain circumstances may simply lie about what motivated them to engage in the stop.²⁰³ Although this is an important concern, it is not unique to this proposal because the same concerns exist under the current *Terry* doctrine and this proposal is not meant to be a panacea for every possible issue related to policing under *Terry*.

One question is whether adoption of the new framework will cause courts to rely too heavily upon an officer’s hit rate and create de facto immunity for officers with high hit rates. In other words, courts may fail to carefully review an officer’s justifications for making the stop because they will be overly influenced by the officer’s history of successful and productive stops. Thus, the fear is that an officer who is engaged in prohibited racial profiling and lies about it will more easily get away with it if he has a high hit rate. If the proposal facilitates racial profiling, then it will exacerbate a problem that already exists and it may provide a reason to abandon implementation.

4. Flawed Assumption?

One assumption underlying this project is that hit rates and articulation will address the problems posed by the nonconsciously biased and inaccurate officer.

200. Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163, 216 (2002).

201. U.S. CONST. amend. XIV, § 1 (“[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.”); *Washington v. Davis*, 426 U.S. 229, 239–42 (1976) (noting that an equal protection violation requires proof of intentional race discrimination).

202. See Donna Coker, *Addressing the Real World of Racial Injustice in the Criminal Justice System*, 93 J. CRIM. L. & CRIMINOLOGY 827, 844–48 & n.100 (2003).

203. Courts have not barred all consideration of race as a factor in the reasonable suspicion analysis. See *supra* note 174; see also I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 66 n.148 (2009) (noting that some courts have considered racial incongruity as a factor giving rise to a reasonable suspicion).

This is an officer who, because he is affected by nonconscious racial biases, will not be proficient at correctly inferring criminality from the ambiguous behaviors engaged in by non-Whites.²⁰⁴

However, what if this assumption is flawed? What if the nonconsciously biased officer can also make accurate judgments of criminality? Although this seems unlikely given the results of implicit social cognition research, should this circumstance arise, then the proposal would be no better than the current approach in preventing the over-policing of non-Whites. This is because the nonconsciously biased, but accurate, officer is one who is more likely to interpret the ambiguous behaviors of non-Whites as suspicious while unintentionally interpreting identical behaviors engaged in by Whites as noncriminal.²⁰⁵

For instance, consider the study described earlier of subjects interpreting an ambiguous physical contact between two people engaged in a heated discussion.²⁰⁶ A nonconsciously biased officer observing this behavior on the street will be more likely to view the contact as aggressive and potentially criminal if the individuals involved are black as opposed to white. As a result, he will stop the black individuals, but ignore or not even notice the white individuals, despite the fact that they are engaged in identical conduct. Even if he is proficient at judging the criminality of this ambiguous contact, he will stop Blacks more often than he stops Whites. Hence, the result will be the same as if he were a consciously biased officer who purposefully stops Blacks at higher rates than Whites, assuming that the consciously biased officer has an acceptable hit rate and hides the fact that he is engaged in race conscious profiling. Under this proposal, then, the stops made by both the consciously biased but accurate officer and the nonconsciously biased but accurate officer would be considered reasonable as long as the hit rate and articulation requirements are met.

Are both scenarios identical from a normative perspective? Clearly, an officer intentionally engaged in race-based policing would violate the Equal Protection Clause. However, is it any better when the officer is doing so nonconsciously? This Article does not attempt to answer this question. All that can be said for now is that the proposal is likely no worse than the current situation. At present, courts will typically defer to the inferences of criminality made by this nonconsciously biased officer anyway.²⁰⁷ The proposal at least will give courts some information about officer proficiency, something that is missing under the current approach to reasonable suspicion cases.

CONCLUSION

Courts and scholars have misunderstood the nature of suspicion. The result is a Fourth Amendment jurisprudence that not only fails to protect individual liberty but also promotes inefficient policing. This Article draws from important new behavioral sciences research concerning the effects of implicit biases on

204. I wish to thank Mary Ann Franks and Illeana Porras for this useful framing.

205. *See supra* notes 46–51 and accompanying text (discussing attentional bias).

206. *See supra* notes 24–30 and accompanying text (discussing experiment).

207. One way the proposal would make this situation worse is if the court would not have deferred but for the presence of a high hit rate.

perceptions and judgments to challenge the assumption that suspicion is objectively determinable. It fashions a more realistic conception of suspicion and utilizes it to consider whether replacing the current fact-centered approach to suspicion with one that places its emphasis on police efficiency is more faithful to Fourth Amendment norms.

Additionally, this Article highlights the need to think seriously about encouraging institutional changes within police departments to address the effects of implicit social cognitions on officer behavior. Perhaps the important questions scholars concerned about policing and the Fourth Amendment should be asking relate to the possibility of structuring police incentives differently. It is my belief that Fourth Amendment doctrine, as currently understood, is limited in its ability to correct for the effects of implicit social cognitions. However, it may be possible to rethink this jurisprudence to create incentives for institutional modifications.

Some might imagine that it is naïve to believe that police officers and departments will change. This assumption is incorrect. Police departments are already experimenting with new internal structures that have improved police citizen interactions.²⁰⁸ Furthermore, there is evidence that police officers may be open to the suggestions contained in this Article. A Los Angeles Police Department sergeant has written that

The proper way for the courts to deal with hunches is, in my view, to acknowledge that some officers are possessed with greater intuitive abilities than others, but then to treat such abilities as an additional factor in an officer's training and experience when weighing the reasonableness of a particular detention. . . . I would not want to live in a country where an officer was prohibited from acting on his hunches, but I would be afraid to live in one where he is empowered to act solely on them.²⁰⁹

My hope is that the preliminary thoughts offered here will serve as a springboard for more dialogue about how to account for the effects of implicit social cognitions on police behavior and to urge courts and scholars to gain a better understanding of the police as an institution.

208. I will explore how internal police department structures can affect policing in one of my future articles, tentatively titled "Police Procedural Justice." See also Wesley G. Skogan & Susan M. Hartnett, *COMMUNITY POLICING*, CHICAGO STYLE 76 (1997) (describing how a decentralized management program led to increased officer satisfaction and better working relationships with the community).

209. Dan Horan, *A Hunch, or the Whispered Voice of Experience?*, 4 J.L. ECON. & POL'Y 13, 23 (2007).